

ADMINISTRATIVE AND CIVIL LAW DEPARTMENT

DESKBOOK 2016



Law of Federal Employment

The Judge Advocate General's Legal Center and School

United States Army

The Law of Federal Employment

Table of Contents

Ch A – Introduction to the Law of Federal Employment

Ch B – Adverse Actions for Unacceptable Employee Performance

Ch C – Employee Discipline for Misconduct

Ch D – Merit Systems Protection Board Practice and Procedures

Ch E – Introduction to Federal Labor-Management Relations

Ch F – Unfair Labor Practices

Ch G – Equal Employment Opportunity Substantive Law

Ch H – Equal Employment Opportunity Practice and Procedure

Ch I – Uniformed Services Employment and Reemployment Rights Act (USERRA)

Ch J – Employee Appeals, Grievances & Judicial Review

Ch K – Negotiated Grievance Procedures and Grievance Arbitration

Ch L – Drafting Settlement Agreements

Ch M – Civilian Whistleblower Complaints and Prohibited Personnel Practices

Ch N – Reduction in Force

Ch O – Emergency Essential Civilians

Appendix 1 – Army Table of Penalties

Appendix 2 – Title 5, Chapter 71 (The Statute)

CHAPTER A
Introduction to the Law of Federal Employment

TABLE OF CONTENTS

I. REFERENCES.....	2
A. STATUTES.....	2
B. GOVERNMENT-WIDE REGULATIONS AND GUIDANCE.....	2
C. MILITARY DEPARTMENT REGULATIONS.....	3
D. OTHER RESOURCES AND WEBSITES.....	3
II. DEVELOPMENT AND STRUCTURE OF THE FEDERAL CIVIL SERVICE SYSTEM	4
A. EVOLUTION FROM SPOILS SYSTEM.....	4
B. KEY PLAYERS IN THE CIVIL SERVICE SYSTEM (GOVERNMENT-WIDE).....	5
C. AGENCY PLAYERS IN THE CIVIL SERVICE SYSTEM	7
III. CLASSIFICATIONS OF FEDERAL EMPLOYEES.....	8
A. BECOMING A CIVIL SERVICE EMPLOYEE	8
B. EMPLOYEES--CLASSIFIED BY TYPE OF SERVICE TO WHICH APPOINTED	12
C. EMPLOYEES--CLASSIFIED BY TENURE STATUS	13
D. EMPLOYEES--CLASSIFIED BY ELIGIBILITY FOR VETERANS' PREFERENCE. 5 U.S.C. § 2108	22
E. CLASSIFICATION OF POSITIONS BY METHOD OF PAYMENT. 5 U.S.C. CHAPTERS 51-59.....	26

Introduction to the Law of Federal Employment

I. REFERENCES.

A. Statutes.

1. Civil Service Reform Act of 1978, found in scattered sections of Title 5, United States Code and codified as amended at 5 U.S.C. §§ 1101-8913.
2. Title 29, United States Code, §§ 791 and 794a (Rehabilitation Act of 1973). In 1992, the Rehabilitation Act (29 U.S.C. § 791(g)) was amended to make standards that apply under Title I of the Americans with Disabilities Act of 1990 (42 U.S.C. § 12112–12114, *et seq.*) and the provisions of §§ 501, 504, and 510 of the Americans with Disabilities Act (42 U.S.C. §§ 12201-204, 12210) applicable in Rehabilitation Act cases to determine whether non-affirmative action employment discrimination occurred. These provisions primarily relate to discrimination based on disability and reasonable accommodation.
3. Title 29, United States Code, § 633a (Age Discrimination in Employment Act).
4. Title 42, United States Code, §§ 2000e to 2000e-17 (Civil Rights Act of 1964, as amended).
5. Title 42, United States Code, §§ 1981, 1988, and 2000e-2 (Civil Rights Act of 1991).
6. Title 5, United States Code, §§ 2302 (Prohibited Personnel Practices).
7. Pendleton Civil Service Act, 22 Stat. 403 (1883).
8. Lloyd-LaFollette Act, 37 Stat. 555 (1912).
9. Veterans Preference Act of 1944, 58 Stat. 387 (1944).
10. Civil Service Due Process Act, 104 Stat. 461 (1990).

B. Government-Wide Regulations and Guidance.

1. Office of Personnel Management (OPM). Title 5, Code of Federal Regulations, Chapter I.
2. Merit Systems Protection Board (MSPB). Title 5, Code of Federal Regulations, Chapter II.

3. Office of Special Counsel (OSC). Title 5, Code of Federal Regulations, Chapter VIII.
 4. Equal Employment Opportunity Commission (EEOC). Title 29, Code of Federal Regulations, Chapter XIV (Part 1614 applies to federal sector equal employment opportunity complaints processing).
- C. Military Department Regulations.
1. Department of Defense. DOD Instruction 1400.25, DOD Civilian Personnel Management System. This Instruction reissued and canceled DOD 1400.25-M, "Civilian Personnel Manual." This Instruction updates policy and assigns responsibility for civilian personnel management of the DOD civilian workforce.
 2. Department of the Army. Army Regulation 690-xxx series.
 3. Department of the Navy. DON issues human resources policies through Secretary of the Navy Instructions (SECNAVINSTs) and guidance through Implementation Guides.
 4. Department of the Air Force. Air Force Instruction 36-xxx series. See Air Force Civilian Personnel Management Support System (PERMISS).
 5. United States Marine Corps. Marine Corps Orders (MCO) 12xxx.x series.
 6. United States Coast Guard. CH-3 Civilian Personnel Actions: Discipline, Performance, Adverse Actions, Appeals, and Grievances, COMDTINST M12750.4.
- D. Other Resources and Websites.
1. U.S. Merit Systems Protection Board Reporter (M.S.P.R.), West Publishing Co., St. Paul, MN. MSPB decisions are also available at the MSPB website: <http://www.mspb.gov/decisions/predec.htm>.
 2. Federal sector decisions of the Equal Employment Opportunity Commission (EEOC) (beginning July 2000) are available at: <http://www.eeoc.gov/federal/decisions.cfm>.
 3. A Guide to Merit Systems Protection Board Law & Practice, Peter B. Broida, Dewey Publications Inc., 1840 Wilson Blvd. Suite 203 Arlington, VA 22201; Tel.: (703) 524-1355; Email: deweypublications@gmail.com; Website: www.deweypub.com. Updated annually.

4. Representing Agencies and Complainants Before the EEOC, Hadley, Laws, and Riley, Dewey Publications, Inc., Dewey Publications Inc., 1840 Wilson Blvd. Suite 203 Arlington, VA 22201; Tel.: (703) 524-1355; Email: deweypublications@gmail.com; Website: www.deweypub.com. [Book's focus is hearing practice].
5. A Guide to Federal Sector Equal Employment Law & Practice, Ernest C. Hadley, Dewey Publications Inc., P.O. Box 663, Arlington, VA 22216; Tel.: (703) 524-1355; Email: deweypublications@gmail.com; Website: www.deweypub.com. Updated annually. [Book's focus is substantive law].
6. Websites.
 - a. OPM: <http://www.opm.gov>.
 - b. MSPB: <http://www.mspb.gov>.
 - c. EEOC: <http://www.eeoc.gov>.
 - d. DOD Civilian Personnel Advisory Service: <http://www.cpms.osd.mil>.
 - e. DOD Directives/Instructions: <http://www.dtic.mil/whs/directives>.
 - f. Army Civilian Personnel Office: <http://www.cpol.army.mil>.
 - g. USMC Human Resources Office: <http://www.hqmc.marines.mil/hrom>.
 - h. Navy Human Resources Office: <http://www.donhr.navy.mil/>.
 - i. Air Force Personnel Center: <http://www.afpc.af.mil/>.
 - j. Army JAGCNET: <http://www.jagcnet.army.mil>.
 - k. United States Coast Guard: <http://www.uscg.mil/civilianHR/>.

II. DEVELOPMENT AND STRUCTURE OF THE FEDERAL CIVIL SERVICE SYSTEM.

- A. Evolution from Spoils System.

1. Pendleton Act, 22 Stat. 403 (1883).
2. Lloyd-LaFollette Act, 37 Stat. 555 (1912).
3. Veterans' Preference Act, 58 Stat. 387 (1944).
4. Civil Service Reform Act of 1978, 92 Stat. 1111 (1978).
5. Whistleblower Protection Act of 1989, 5 U.S.C. § 1211 (establishing Office of Special Counsel as independent agency).
6. Civil Service Due Process Amendments of 1990, 104 Stat. 461 (1990). Amends 5 U.S.C. § 7511 to extend procedural protections to certain excepted service employees who have completed 2 years of continuous service. This includes the right to appeal adverse personnel actions to the MSPB.

B. Key Players in the Civil Service System (Government-Wide).

1. The President and Congress. U.S. Const. Art. II, § 2, Cl. 2: The President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein provided for and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.
2. Office of Personnel Management (OPM). 5 U.S.C. §§ 1101-1105.
 - a. Source: A successor agency to the Civil Service Commission created under the authority of the Civil Service Reform Act of 1978.
 - b. Function: The principal function of the OPM is to set policy and provide guidance to other federal agencies in matters regarding federal employees.
3. Merit Systems Protection Board (MSPB). 5 U.S.C. §§ 1201-1206.
 - a. Source: Three-member bipartisan board created under the authority of the Civil Service Reform Act of 1978.
 - b. Functions:
 - (1) Hear and adjudicate cases within its jurisdiction;

- (2) Conduct special studies; and
 - (3) Review OPM rules and regulations to determine validity.
- 4. Office of Special Counsel (OSC). 5 U.S.C. §§ 1211-1219.
 - a. Sources: The Civil Service Reform Act of 1978; Whistleblower Protection Act of 1989; Whistleblower Protection Enhancement Act of 2012; the Hatch Act.
 - b. Functions: OSC receives, investigates, and prosecutes allegations of prohibited personnel practices (PPPs), with an emphasis on protecting federal government whistleblowers.
 - (1) OSC seeks corrective action remedies (such as back pay and reinstatement), by negotiation or from the Merit Systems Protection Board (MSPB), for injuries suffered by whistleblowers and other complainants. OSC is also authorized to file complaints at the MSPB to seek disciplinary action against individuals who commit PPPs.
 - (2) OSC promotes compliance by government employees with legal restrictions on political activity by providing advisory opinions on, and enforcing, the Hatch Act. The Hatch Act Unit also enforces compliance with the Act. Depending on the severity of the violation, OSC will either issue a warning letter to the employee, or prosecute a violation before the MSPB.
- 5. Equal Employment Opportunity Commission (EEOC).
 - a. Source: The EEOC was established by Title VII of the Civil Rights Act of 1964; however, the Act did not originally apply to the federal sector. The Equal Employment Opportunity Act of 1972 made Title VII applicable to the federal workplace. Responsibility for federal sector EEO was vested in the Civil Service Commission. Presidential Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 19,807 (1978) transferred enforcement power for federal sector EEO complaints from the Civil Service Commission to the EEOC.
 - b. Functions: The EEOC coordinates all federal equal employment opportunity regulations, practices, and policies. It interprets employment discrimination laws, monitors the federal sector employment discrimination program, and sponsors outreach and technical assistance programs.
- 6. Federal Labor Relations Authority (FLRA).

- a. Source: The FLRA was created by the Civil Service Reform Act of 1978 (5 U.S.C. §§ 7104-7105) and is a quasi-judicial body with three full-time members who are appointed for five-year terms by the President.
- b. Functions: The FLRA establishes policies and guidance relating to federal sector labor-management relations and resolves disputes and ensures compliance with Title VII of the Civil Service Reform Act of 1978, known as the Federal Service Labor-Management Relations Statute. It adjudicates disputes arising under the Statute, deciding cases concerning the negotiability of collective bargaining agreement proposals, appeals concerning unfair labor practices and representation petitions, and exceptions to grievance arbitration awards.

C. Agency Players in the Civil Service System.

- 1. DoD Defense Civilian Personnel Advisory Service (DCPAS). Mission: The DOD enterprise leader in the development and delivery of civilian personnel policies and HR solutions to strengthen mission readiness of the Total Force.
- 2. Installation Level Players.
 - a. Labor Counselor. Provides advice concerning civilian personnel law, employment discrimination law and all labor relations matters. Represents Department of the Army as a trial attorney before arbitrators, investigators and administrative judges from various agencies including the MSPB, the EEOC, the Federal Labor Relations Authority, and the Federal Services Impasses Panel. Cases involve union and employee grievances on a wide variety of topics, adverse actions, reductions-in-force, employment discrimination, and collective bargaining.
 - b. The Civilian Personnel Office (CPO).
 - (1) DOD worldwide regionalization of CPOs.
 - (a) Army: Civilian Human Resources Agency (CHRA) (<http://www.chra.army.mil>) exercises control over the Army's civilian personnel system.
 - (b) Air Force: One Regional Service Center, Randolph AFB, TX.
 - (c) Navy: Seven Human Resource Service Centers. <http://www.donhr.navy.mil/>

- (d) Defense Finance and Accounting Service. Indianapolis, IN.
 - (e) Defense Logistics Agency. Columbus, OH.
<http://www.hr.dla.mil/ContactUs/Columbus.asp>
 - (f) Washington Headquarters Service (DOD National Capital Region) Alexandria, VA.
- (2) Civilian Personnel Advisory Centers (CPACs). CPAC Functions: Report to commander, general advice and assistance, labor management negotiations, disciplinary actions, employee benefits, recruitment strategies, position management.
- c. Equal Employment Opportunity (EEO) Office. Serve as the Commander's primary advisor on Equal Employment Opportunity (EEO) and Affirmative Employment; provide EEO related training; provide leadership and guidance in administering the Outreach and Special Emphasis Programs; plan, develop and monitor the implementation of the installation Affirmative Employment Plan; timely processing of Department of Army Discrimination Complaints; and manage the installation Army Complaints Tracking System.

III. CLASSIFICATIONS OF FEDERAL EMPLOYEES.

- A. Becoming a Civil Service Employee--Statutory Requirements. By statute, before an individual is appointed as an employee of the federal government, certain defined steps must be followed. The requisites of employment are defined in 5 U.S.C. § 2105 as: 1) appointment in the civil service by one of several designated officials including a) the President; b) a Member or Members of Congress, or the Congress; c) a member of a uniformed service; d) an individual who is an employee under this section; e) the head of a Government controlled corporation; or f) an adjutant general designated by the Secretary concerned under section 709(c) of Title 32; 2) performance of a federal function; and 3) supervision in the performance of duties by a federal official.
1. Appointment.

- a. *Bevans v. Office of Personnel Management*, 900 F.2d 1558 (Fed. Cir. 1990). Petitioner's deceased husband's survivorship benefits did not include the time he spent as an employee with an airline that was a proprietary corporation of the CIA. He left that position to work for the U.S. Air Force. None of his employment with the airline was credited to him for retirement or leave computation purposes. The court found that the husband was not an employee within the definition of 5 U.S.C. § 2105(a) while he was employed by the airline. The court found that the administration of an oath was not enough to establish that the husband was appointed in the civil service. The court held that there was no evidence that he had been appointed by an individual authorized to make such appointments, no deductions were made for the civil service retirement fund, and there was no evidence that he believed he had been appointed to civil service.
- b. *Bernabe v. Office of Personnel Management*, 198 Fed. Appx. 961 (Fed. Cir. 2006). Mr. Ramon Bernabe filed for review of the decision of the MSPB which affirmed OPM's denial of his application for a civil service retirement annuity. The decision of the administrative judge appropriately turned on whether Mr. Bernabe was an appointed employee. An appointment by one of [listed employees] acting in an official capacity is necessary for a person to hold a government position and be entitled to its benefits. The requirement that the "employee" be "appointed" excludes one whose services are retained merely by contract. Mr. Bernabe's statement in his petition for review by the Board stated that although he was recruited by Luzon Stevedoring Company to work in Guam, the company was acting only as an intermediary or agent of the U.S. Navy. The court concluded that Mr. Bernabe's own statement clarifies the relation between him and the Navy. He was, by his own admission, not appointed to a position as a federal employee, but rather was the employee of a government contractor. The court affirmed the MSPB decision.
- c. *Horstmann v. Office of Personnel Management*, 1998 U.S. App. LEXIS 26223 (Fed. Cir. Oct. 14, 1998) (unpublished). The absence of any evidence that Mr. Paul Horstmann was appointed to any Federal government position precludes a finding of an employment relationship with NASA under 5 U.S.C. § 2105(a) and necessarily precludes him from the receipt of disability retirement benefits pursuant to the Civil Service Retirement Act. Mr. Horstmann was unable upon request of OPM to produce pay stubs, a signed oath, a Standard Form 50 or 52, or any other indicia of appointment that would suggest he was appointed in the civil service and produced no evidence that deductions for civil service retirement benefits were ever withheld from his salary. The court declined to award federal employee status.

- d. *Horner v. Acosta*, 803 F.2d 687 (Fed. Cir. 1986). Individuals selected to participate in the Department of the Navy's newly formed intelligence unit program were required to enter into a contract for personal services with the Navy or with a proprietary corporation. The contract employees (supervised by a federal official), were not appointed to civil service positions, yet filed a claim with the OPM for service credit under the Civil Service Retirement Act (CSRA). The court held that the MSPB did not err in finding that the employees were not appointed in the civil service within the meaning of 5 U.S.C. § 2105(a) and that the finding was supported by substantial evidence. The court concluded that the evidence demonstrated the absence of the exercise of appointive authority to select the employees for civil service positions. Therefore, the court held that the employees were not entitled to service credit under the CSRA.
2. Engaged in the performance of a federal function.
 - a. *McCarley v. Merit Systems Protection Bd.*, 757 F.2d 278 (Fed. Cir. 1985), *overruled on other grounds by Hagmeyer v. Dep't of Treasury*, 852 F.2d 531 (Fed. Cir. 1988). MSPB properly dismissed Mr. Robert McCarley's appeal because although appointed, Mr. McCarley had not yet started work and therefore had not performed a federal function nor been supervised.
 - b. *Parkin v. Merit Systems Protection Bd.*, 120 Fed. Appx. 349 (Fed. Cir. 2005). Mr. Charles Parkin was initially offered employment by a written notice dated January 9, 2002, and he timely accepted the offer. He was scheduled to begin training on January 27, 2002, but was unable to begin on that date because he was on active duty in the armed forces, having been called to active duty at the end of September 2001. The court held that the MSPB properly found that there was no evidence that Mr. Parkin had performed any service for the agency before January of 2003, and thus could not have met either of the requirements of 5 U.S.C. § 2105 such that he engaged in the performance of a federal function or was subject to the supervision of an individual.
3. Supervision.
 - a. *Simmons v. Dep't of Agriculture*, 80 M.S.P.R. 380 (1998). Employees of the cooperative extension service (CES) at a public university filed individual right of action (IRA) appeals challenging first employee's termination and second employee's reassignment. The MSPB held that: (1) the employees qualified as "federal employees" for jurisdictional purposes; (2) Director of CES was acting in his capacity as federal employee when he took adverse personnel actions against employees, and, thus, it was the

U.S. Department of Agriculture, not the university, that took the actions. The court found that the appellants meet the definition of "employee" under 5 U.S.C. § 2105 by virtue of their Schedule A excepted service appointments by a Federal official and their performance of a Federal function under the direction of a Federal official, the CES Director.

- b. *Hedge v. Lyng*, 689 F.Supp. 912 (D. Minn. 1988). The court held that the committee members were never formally evaluated by Local Farmer Home Association (FmHA) officials, thus were not "federal employees." The court reasoned that elected committee members are not "subject to the supervision" of an FmHA employee but rather function free from immediate supervision and control by the FmHA administration. Furthermore, elected committee members are not subject to many common aspects of supervision--the quality of their work is not formally evaluated; their pay is not contingent on performance; there is no authority for dismissing them during their term. The court held that the committee is not "subject to the supervision" of the county supervisor within the meaning of 5 U.S.C. § 2101(a)(3), thus were not federal employees.
4. Employee. *Rossebo v. Defense Logistics Agency and Dep't of Commerce*, 20 M.S.P.R. 447 (1984). Appellant met all three criteria of the definition of "employee." Appellant met the first criterion since Department of Commerce's (DOC) approving official approved appellant's transfer date and issued an SF-50 documenting appellant's appointment. The second criterion was satisfied since appellant was officially placed on DOC's personnel rolls as of February 13, 1983, and was allowed two days' travel time at DOC's expense before reporting to duty. The third criterion was satisfied since appellant was under the direct supervision of a DOC official who directed and counseled the appellant in connection with his use of official travel time in preparation for reporting for duty.
5. Nonappropriated Fund (NAF) employees are not deemed employees for the purpose of laws administered by the OPM, with exceptions. 5 U.S.C. § 2105(c)(1). *Patricia J. Mills v. Merit Systems Protection Bd.*, 103 FMSR 50 (2002) (Ms. Mills was employed as an Accounting Technician Work Leader, NF-0525-03, for the Department of the Navy at the Marine Corps Community Services, Marine Corps Base, Camp Lejeune, North Carolina. Community Services is a Non-Appropriated Fund Instrumentality ("NAFI"). She was removed from her position for misconduct. She filed an appeal with the Merit Systems Protection Board challenging her removal and alleging discrimination. The Board dismissed for lack of jurisdiction. The court affirmed the final decision of the Board.

B. Employees--Classified by Type of Service to Which Appointed.

1. Competitive Service. 5 U.S.C. § 2102. More than 80% of Federal employees are employed in the competitive service. Testable-type skills. Applicants compete for the job and are evaluated according to objective standards. Their “examination” may be in form of an evaluation of experience provided on an application, a written test, a review of work samples, or all of the above.
2. Excepted Service. 5 U.S.C. § 2103. Over 19% of Federal employees are excepted service.
 - a. Statutory definition: “[T]hose civil service positions which are not in the competitive service or the Senior Executive Service.” This type of appointment is made for positions excepted from the competitive service system by law, executive order, or with OPM approval.
 - b. Excepted Service Schedules. 5 C.F.R. § 213.102.
 - (1) Schedule A: Positions for which it is not practicable to apply qualification standards and requirements used in the competitive service system and which are not of a confidential or policy determining nature. Examples include lawyers, chaplains, and faculty members at service academies.
 - (2) Schedule B: Positions for which it is not practicable to hold competitive examinations and which are not of a confidential or policy determining nature. Appointees must meet OPM's basic qualification standards for the job. Examples include Department of Agriculture research associates, trainees in cooperative education programs.
 - (3) Schedule C: Key positions which are policy-determining or which involve close personal relationship between incumbent and agency head or key officials. No examinations. Most political appointees below subcabinet level are appointed under Schedule C.
 - (4) Schedule D: Positions other than those of a confidential or policy-determining character for which the competitive service requirements make impracticable the adequate recruitment and selection of sufficient students. Examples include students and recent graduates appointed under Pathways Programs.

3. Senior Executive Service (SES). 5 U.S.C. §§ 2101a and 3132(a)(2). Less than one half of one percent of employees is in the SES. Established by the Civil Service Reform Act of 1978 as a separate personnel system for employees who administer at the top levels of Federal government. Managerial, supervisory, and policy positions classifiable above GS-15. SES appointments can be career, noncareer, limited term, or limited emergency. Veterans' preference does not apply.
 - a. Career. Initial career appointments to the SES must be based on merit competition. Agency Executive Resources Boards conduct the merit staffing process leading to initial career appointment. Vacancies must be advertised Government-wide. OPM administers interagency Qualification Review Boards who certify the executive qualifications of agency selectees before their initial SES career appointment. *A one-year probationary period follows initial career appointment.* At least 70% of SES positions Government-wide must be filled by individuals with 5 years or more of current, continuous service immediately before initial SES appointment to assure experience and continuity.
 - b. Non-career and limited appointments are made without competition. The agency head or his/her designee approves the candidate's qualifications. Law limits number of noncareer SESs to 10% of total SES positions.

C. Employees--Classified by Tenure Status.

Overview. The probationary or trial period is the final step in the examination process of a new employee. The probationary period can be a highly effective tool to evaluate a candidate's potential to be an asset to an agency before an appointment becomes final. However, for the probationary period to be used effectively, agencies must understand when an individual is considered to have full procedural and appeal rights, regardless of any probationary status.

1. The term "probationary period" generally applies to employees in the competitive service. "Trial period," by contrast, generally applies to employees in the excepted service, as well as to some appointments in the competitive service, such as term appointments, which have a one-year trial period set by the OPM. A fundamental difference between the two is the length of time in which employees must serve. The probationary period is set by law as one year. When the trial period is set by individual agencies, it can last up to two years.

- a. During this period, probationary employees can be terminated for any perceived deficiency in performance or conduct, with minimal procedural requirements and without the need to meet the stringent "efficiency of the service" standard that governs the removal of tenured employees. However, some probationary employees in the competitive service may be afforded appeal rights based on previous government service. The term "probation" is also used to refer to the one-year trial period served by individuals who are newly appointed to supervisory positions.
 - b. If used correctly, this "job tryout" can be one of the most reliable and valid assessment tools available to agencies when an individual is either employed in his first position or moves to a new and different type of position. Proper use of this tool helps promote the merit system principle that selection should be determined solely on the basis of relative ability, knowledge and skills.
2. Requirement for probationary period. 5 U.S.C. § 3321; 5 C.F.R. §§ 315.801-315.806. Purpose--an extension of the hiring process; to determine the employee's fitness and qualifications for continued employment. 5 C.F.R. § 315.803. *U.S. Dep't of Justice v. Fed. Labor Relations Auth.*, 709 F.2d 724 (D.C. Cir. 1983).
- a. Competitive Service Employee. One year probationary period.
 - (1) When probationary period required.
 - (a) When employee is given a career or career-conditional appointment and:
 - (i) Was appointed from competitive list of eligibles;
 - (ii) Was reinstated, unless employee completed probationary period or served with competitive status under an appointment which did not require probationary period; or
 - (iii) Was transferred, promoted, demoted, or reassigned before completing the probationary period.

- (b) Employees reinstated from Reemployment Priority List to position in same agency and same commuting area, do not have to serve new probationary period, unless probationary period was not completed in last job. 5 C.F.R. § 315.801.
- (2) Tacking Rule. 5 C.F.R. § 315.802(b). The probationary period required by § 315.801 is 1 year and may not be extended. Prior Federal civilian service counts toward completion of probation when the prior service:
 - (a) Is in the same agency, e.g., Department of the Army;
 - (b) Is in the same line of work (determined by the employee's actual duties and responsibilities); and
 - (c) Contains or is followed by no more than a single break in service that does not exceed 30 calendar days.
 - (3) Intermittent Employees Probationary Period. 5 C.F.R. § 315.802(d). The probationary period for part-time employees is computed on the basis of calendar time, in the same manner as for full-time employees. For intermittent employees, i.e., those who do not have regularly scheduled tours of duty, each day or part of a day in pay status counts as 1 day of credit toward the 260 days in a pay status required for completion of probation. However, the probationary period cannot be completed in less than 1 year of calendar time.
- b. Excepted Service Employee.
- (1) Preference eligible excepted service employees must serve a one year probationary equivalent time period. 5 U.S.C. § 7511.
 - (2) Nonpreference eligible excepted service employees.
 - (a) Must serve two years of "current continuous service . . . under other than a temporary appointment . . ." *Forest v. Merit Systems Protection Bd.*, 47 F.3d 409 (Fed. Cir. 1995).

- b. An appellant fits within the definition of “employee” in 5 U.S.C. § 7511 (a)(1)(C)(ii) if she has completed **two years of current continuous service** in the same or similar positions in an executive agency under other than a temporary appointment limited to two years or less. *Van Wersch v. Dep’t of Health and Human Services*, 197 F.3d 1144 (Fed. Cir. 1999).
 - c. An appellant who was serving a probationary period at the time she was terminated is an "employee" with appeal rights if she has completed **more than one year of current continuous service** under other than a temporary appointment limited to one year or less. *McCormick v. Dep’t of Air Force*, 307 F.3d 1339 (Fed. Cir. 2002).
 - (1) **“Current continuous service”** means a period of employment or service immediately preceding an adverse action in the same or similar positions without a break in Federal civilian employment of a workday. 5 C.F.R. § 752.402(b).
 - (2) The Federal Circuit's decisions in *Van Wersch* and *McCormick* could effectively preclude the use of "job tryouts" for some applicants based solely on their prior experience. That is, even though an agency may intend that all applicants, if hired, be required to serve a probationary or trial period, some applicants will be subject to no period, or an abbreviated period, in which an agency can evaluate their performance and fitness for the job before those applicants acquire procedural and appeal rights under 5 U.S.C., Chapter 75.
 - d. *St. Clair v. Merit Systems Protection Bd.*, 289 Fed.Appx. 395 (2008). Unlike the petitioners in *McCormick* and *Van Wersch*, office automation assistant, Ms. St. Clair, had a break in service. Therefore she did not meet requirements of "current continuous service," and consequently was not an "employee" who could appeal removal from employment to the MSPB, where there was a five-year interruption between her past service and the probationary service from which she was removed.
4. Significance of probationary status. Pursuant to 5 U.S.C. § 3321 as well as other provisions show that Congress intended probationary employees to have fewer procedural rights than permanent employees in the competitive service. Even preference eligibles are required to complete a probationary or trial period before they are entitled to hearing procedures afforded persons in the competitive service. *Sampson v. Murray*, 415 U.S. 61 (1974).

- a. Probationary employees who do not meet acceptable standards may be removed from civil service without the formal procedures (due process) that apply to non-probationers. 5 C.F.R. § 315.804 (requiring only notice of effective date and stated reason for termination of probationer); *Pierce v. Gov't Printing Office*, 70 F.3d 106 (1995); *Toyens v. Dep't of Justice*, 58 M.S.P.R. 634 (1993).
 - (1) Education technician employed by the Department of the Army for the U.S. Army Logistics Management College at Fort Lee, Virginia, notified of his termination due to poor performance during his probationary period. Appellant resigned in lieu of termination while still within the 1-year probation period at the time of his resignation. Appellant's alleged involuntary resignation claims did not fall within any of the limited circumstances in which a probationary employee enjoys rights to appeal. MSPB dismissal of his appeal for lack of jurisdiction affirmed. *Baker v. Dep't of Army*, 2009 WL 3260078 (Fed. Cir. Oct 13, 2009).
 - (2) Department of the Army employee on probationary status at time of his termination had no property interest in his employment and thus no valid due process claim; while his termination seven days before end of probationary period was unfortunate from his perspective, it did not bestow upon him the rights of regular employee generally or property right in his employment in particular. *Pharr v. Merit Systems Protection Bd.*, 173 Fed.Appx. 817 (Fed. Cir. Mar 10, 2006).
 - (3) Termination of employee's appointment to supervisory position with Federal Law Enforcement Training Center became effective before end of employee's probationary period, and therefore MSPB had no jurisdiction over his challenge to his removal to nonsupervisory position, where agency action came on last day before employee's anniversary date and one hour before his regularly scheduled tour of duty ended. *Hardy v. Merit Systems Protection Bd.*, 13 F.3d 1571 (Fed.Cir. 1994).
5. Probationary employees' limited MSPB appeal rights.

- a. When separated, a competitive service probationary employee has limited appeal rights to the MSPB. 5 C.F.R. §§ 315.804-06. The employee has the right to a jurisdictional hearing to determine whether the termination was based upon partisan political reasons or marital status or that his termination was based upon pre-appointment reasons and was procedurally incorrect. *Park v. Dep't of Health and Human Services*, 78 M.S.P.R. 527 (1998); *Rhone v. Dep't of Treasury*, 66 M.S.P.R. 257 (1995).
 - b. Probationary employee made a nonfrivolous allegation he was terminated for pre-appointment reasons and without complying with the procedures of 5 C.F.R. § 315.805, and thus was entitled to a jurisdictional hearing; employee alleged that after his appointment, agency became aware of his prior removal by another agency, and issued a termination notice only a few weeks after supervisor find him suitable for employment. *Milanak v. Dep't of Transp.*, 90 M.S.P.R. 219, 220 (2001).
 - c. Absent any showing that discharge was based on employee's failure to provide accurate information on pre-application forms was actually due to partisan political reasons, the employee was not entitled to further review by the MSPB. *Bante v. Merit Systems Protection Bd.*, 966 F.2d 647 (Fed.Cir. 1992).
6. Pre-employment conditions. If terminating probationary employee for conditions arising before appointment, employee is entitled to (1) advance written notice of reasons for the action; (2) reasonable time to file written answer; and (3) written notice of decision, reason for the decision, and right to appeal to MSPB. 5 C.F.R. § 315.805.
- a. An appellant against whom an agency takes an action based on an allegedly unlawful appointment is not deprived of the procedural rights to which he would be otherwise entitled unless the appointment violates an absolute statutory prohibition so that the appointee is not qualified for appointment in the civil service. *Keller v. Dep't of Navy*, 69 M.S.P.R. 183 (1996); *See, e.g., Torres v. Dep't of the Treasury*, 47 M.S.P.R. 421, 422 (1991); *Garcia v. Dep't of Air Force*, 18 M.S.P.R. 142, 145 (1983).
 - b. An employee terminated during the probationary period based on an alleged error in the appointment process is nevertheless entitled to the procedural requirements of 5 C.F.R. § 315.805. *Padilla v. EEOC*, 18 M.S.P.R. 121, 126 (1983).

- c. Agency's failure to provide probationary employee, who was terminated for pre-appointment reasons with his procedural rights of notice and reply was harmful error; employee showed that if agency had afforded him his procedural rights, he could have presented evidence that, among other things, his father-in-law was in no way involved with employee's appointment, which would likely have caused agency to reach a conclusion different from the one it reached. *Keller v. Dep't of Navy*, 69 M.S.P.R. 183 (1996).
- 7. No entitlement to have the MSPB review the correctness of the agency decision.
 - a. *Gaxiola v. Dep't of Air Force*, 6 M.S.P.R. 515 (1981). Probationary employee was terminated from position for failing to disclose on personal qualifications statement his four years of service in Air Force, his conviction by general court-martial for possession and sale of marijuana, confinement for ten months, reduction of two grades, and bad conduct discharge. The Air Force met all procedural requirements that govern termination of probationers for conditions arising before appointment, therefore MSPB properly refused to review agency action on the merits, which were not subject to review under controlling regulations. *See also Munson v. Dep't of Justice*, 55 M.S.P.R. 246 (1992).
 - b. In an appeal under 5 C.F.R. § 315.806(c) the merits of the agency's decision to terminate a probationer terminated for pre-appointment reason are not before the Board. Rather, only the issue of whether the agency's failure to follow the procedures prescribed in 5 C.F.R. § 315.805 was harmful error is presented; if there was harmful error, the agency's action must be set aside. *Pope v. Dep't of Navy*, 62 M.S.P.R. 476 (1994).
- 8. Negotiated Grievance Procedure concerning separation of probationary employee is precluded by 5 U.S.C. § 3321, 7121.
 - a. Immigration and Naturalization Service did not have to bargain over union proposal to bring probationary employees within grievance procedures of collective bargaining agreement, since the Civil Service Reform Act and implementing regulations preserved agencies' right to summarily discharge probationary employees for unacceptable performance, regardless whether union proposal provided similar or different procedures for probationary employees as opposed to nonprobationary employees. *Dep't of Justice, Immigration and Naturalization Serv. v. Fed. Labor Relations Auth.*, 709 F.2d 724, 727-28 (D.C. Cir. 1983).

- b. *Nellis Air Force Base and American Fed'n of Gov't Employees Local 1199*, 46 FLRA 1323 (1993) (Congress expressly preserved an agency's discretion to summarily remove a probationary employee. The court further noted that Congress instructed the OPM and not the FLRA to implement the probationary program and to provide whatever procedural protections are necessary for probationary employees. Procedural protections for probationary employees cannot be established through collective bargaining under the Statute.) *See e.g., National Treasury Employees Union v. Fed. Labor Relations Auth.*, 848 F.2d 1273 (D.C.Cir.1988) (the court reiterated its earlier INS ruling that Congress intended agencies to retain the power to summarily terminate probationary employees. The court held that to allow probationary employees to grieve their separations if based on unlawful discrimination “would eviscerate Congress's intention that collective bargaining not supplement probationers' existing procedural protections”).
9. Employee tenure upon appointment: Career-conditional. 5 C.F.R. § 315.301.
- a. Acquisition of career status. After serving three continuous years under a career-conditional appointment, the employee will automatically receive a career appointment.
 - (1) If employee leaves federal service before acquiring career status (and not return in 30 days), a new three-year period must be completed.
 - (2) Employees with veterans' preference retain lifetime reinstatement eligibility.
 - b. Significance of career status: Noncompetitive promotion and placement. A career appointment confers permanent status with greatest possible job protection. Career employees have permanent reinstatement eligibility (if leave federal service, they may be considered for reemployment without having to take another competitive civil service examination). 5 C.F.R. Part 315.
10. Due Process in Performance-Based or Misconduct-Based Adverse Actions.
- a. Extensive due process rights.
 - (1) Nonprobationary competitive service employees.
 - (2) Nonprobationary preference eligible excepted service employees.

- (3) Most nonprobationary nonpreference eligible excepted service employees with more than two years of current continuous service.
 - (4) Note: The Civil Service Due Process Amendments of 1990, 104 Stat. 461 (1990), amended 5 U.S.C. § 7511 to extend procedural protections to certain excepted service employees who have completed 2 years of continuous service. Includes the right to appeal adverse personnel actions to the MSPB.
 - b. Limited due process rights.
 - (1) Probationary competitive service and probationary, preference eligible excepted service employees.
 - (2) Nonpreference eligible excepted service employees with less than two years of current continuous service.
 - (3) Temporary or term appointees; some excepted service employees not subject to Due Process Amendments of 1990. *Todd v. Merit Systems Protection Bd.*, 55 F.3d 1574 (Fed. Cir. 1995) (Employees of DODDS schools do not receive appeal rights); *Monser v. Dep't of Army*, 67 M.S.P.R. 477 (1995) (Civilian Intelligence Personnel Management System employees do not receive appeal rights).
 - c. Senior Executive Service. See 5 CRF § 317.302. If career SES is removed during probationary period, there are no MSPB appeal rights. 5 C.F.R. § 359.407; 5 U.S.C. § 7701. Nonprobationary career SES may have fallback rights to a GS-15 position unless removal is for misconduct.
- D. Employees--Classified by Eligibility for Veterans' Preference. 5 U.S.C. § 2108.
- 1. General Principles.
 - a. Goal is not to place a veteran in every vacant federal job (would be incompatible with merit principles).
 - b. Preference applies in hiring from civil service examinations conducted by the OPM and agencies under delegated examining authority, for most excepted service jobs including Veterans' Readjustment Appointments (VRA), and when agencies make temporary, term, and overseas limited appointments.

- c. Veterans' preference does not apply to promotion, reassignment, change to lower grade, transfer or reinstatement.
 - (1) *Brown v. Dep't of Veterans Affairs*, 247 F.3d 1222 (Fed. Cir. 2001) (Neither the Veterans' Preference Act nor the Vietnam Era Veterans' Readjustment Assistance Act of 1974 accorded veterans' preference for promotions and intra-agency transfers. The statutes accorded veterans' preference only for initial employment.)
 - (2) *Scharein v. Dep't of Army*, 91 M.S.P.R. 329 (2002) (Veterans' preference rights not violated when agency redesignated civilian position for which appellant had been leading candidate as a military position.)
- d. Veterans' preference does not require an agency to use any particular appointment process. Agencies have broad authority under law to hire from any appropriate source of eligibles including special appointing authorities. An agency may consider candidates already in the civil service from an agency-developed merit promotion list or it may reassign a current employee, transfer an employee from another agency, or reinstate a former Federal employee. In addition, agencies are required to give priority to displaced employees before using civil service examinations and similar hiring methods.

2. General Requirements.

- a. Honorable or general discharge is always necessary.
- b. Military *retirees* at rank of major (O-4) or higher are not eligible for preference unless they are disabled veterans. This does not apply to Reservists who will not begin drawing military retired pay until age 60.
- c. For non-disabled users, active duty for training by National Guard or Reserve Soldiers does not qualify as "active duty" for preference.

3. Which veterans get preference?

- a. General Rule: Individuals who enter military service after October 14, 1976, will not receive veterans' preference unless they receive a campaign expeditionary medal, or serve in a war declared by Congress, or become disabled during or as a result of military service.

- b. Service on active duty in the armed forces “during, or at the time of, a campaign or expedition for which a campaign badge has been authorized” is not sufficient. Rather, the individual must have served in the campaign or expedition for which a campaign badge was authorized. *Perez v. Merit Systems Protection Bd.*, 85 F.3d 591 (Fed. Cir. 1996).
- c. Those who served during the period from April 28, 1952, through July 1, 1955 receive preference.
- d. Those who served for a period of more than 180 consecutive days after January 31, 1955 and before October 15, 1976 receive preference.
- e. Those who served on active duty during the (first) Gulf War from August 2, 1990, through January 2, 1992, receive preference.
- f. Those who served on active duty in a campaign or expedition for which a campaign medal has been authorized, including, but not limited to, El Salvador, Lebanon, Granada, Panama, Southwest Asia, Somalia, Haiti, Bosnia, Herzegovina, and Kosovo.
- g. In addition, the Fiscal Year 2006 National Defense Authorization Act authorizes service members who served on active duty for more than 180 consecutive days, other than for training, any part of which occurred during the period beginning September 11, 2001, and ending on August 31, 2010, the last day of Operation Iraqi Freedom.
- h. Two-year minimum active duty service condition for Gulf War veterans and campaign medal holders entering military service after September 7, 1980. Does not apply for disabled veterans. Reserve and Guard members need not have served two years provided they served the full period when called or ordered to active duty.
- i. The Global War on Terrorism Expeditionary Medal will recognize service members who deployed overseas as part of Operation Enduring Freedom. Receipt of this medal is qualifying for veterans’ preference (provided the individual is otherwise eligible).
- j. The Global War on Terrorism Service Medal will recognize those who served in support of Operation Noble Eagle. A service medal is not qualifying for veterans’ preference, but it would be qualifying for a Veterans’ Recruitment Appointment (VRA) under the newly revised VRA authority.

4. Derived Preference. In some cases, the unmarried widow, unmarried widower, wife, husband, or mother of a veteran may use veterans' preference.
5. Effects of preference eligibility.
 - a. Disabled means a veteran with (1) present service-connected disability; or (2) is receiving compensation, disability retirement benefits, or pension from the military or the Department of Veteran Affairs, or who was awarded the Purple Heart.
 - b. 30-Percent Disabled Veterans. Under the Civil Service Reform Act of 1978, a disabled veteran with compensable service-connected disability of 30% or more who meets the qualification standards may be given a noncompetitive appointment (which may lead to conversion to career or career-conditional employment).
 - c. Agencies wanting to disqualify or non-select an eligible applicant with 30% veterans' preference on a civil service list of eligibles must first notify OPM and the applicant. Applicant may appeal within 15 days.
 - d. 10-Point Preference. Ten points are added to the earned rating of disabled veterans and veterans awarded the Purple Heart.
 - e. 5-Point Preference. In civil service examinations, 5 points are added to the earned rating of an applicant who makes a passing grade and who was honorably separated from the military.
 - f. Hiring. When referral is made from external recruitment sources, such as the OPM Certificates, Veterans Readjustment Appointment, or outside the register authority for temporary appointment, candidates are ranked and referred in veterans' preference order. This order of referral often restricts the supervisor's ability to select. Normally, veterans' preference eligibles listed above nonpreference eligibles on a referral list must be selected before any nonpreference eligibles can be selected.
 - (1) Example: The "Rule of Three" and Veterans Passovers.
 - (a) If the top person on a certificate is a 10-point disabled veteran and the second and third persons are 5-point preference eligibles, the appointing authority may choose any of the three.

(b) If the top person on a certificate is a 10-point disabled veteran, the second person is not a preference eligible, and the third person is a 5-point preference eligible, the appointing authority may choose either of the preference eligibles. The appointing authority may not pass over the 10-point disabled veteran to select the nonpreference eligible unless an objection has been sustained.

(2) New Hiring Flexibilities. Section 1312 of The Homeland Security Act of 2002 (5 U.S.C. § 3319) provides an alternative to the “rule of three” scoring procedure called “Category Rating.” Veterans’ preference still applies (5 C.F.R. 337.304).

g. Veterans with career tenure. Veterans with career civil service tenure have job retention rights over all other federal workers in the same competitive level. Veterans with career-conditional tenure do not have job retention rights over non-veterans with career tenure.

h. Reduction-in-force (RIF) actions. 5 U.S.C. § 3502. Veterans who are disabled or served on active duty in the armed forces during specified time periods or in military campaigns are entitled to preference in retention during RIF.

i. Actions for unacceptable performance and misconduct. 5 U.S.C. §§ 4303(e), 7511(a)(1)(B), and 7513(d). Veterans in the excepted service who have completed one year of current continuous service are entitled to MSPB appeal of adverse actions. (Non-veterans must serve two years before gaining same MSPB appeal rights.)

6. Constitutionality of preference. *Frederick v. United States*, 507 F.2d 1264 (Ct. Cl. 1974). Veterans' preference in federal employment has been an established policy of Congress for many years. Encouragement and reward of military service are its rational basis. The Supreme Court and other courts have enforced it, and have done so without suggesting any possible constitutional difficulty. *See also Massachusetts v. Feeney*, 442 U.S. 256 (1979).

E. Classification of Positions by Method of Payment. 5 U.S.C. Chapters 51-59.

1. General Schedule Employees. 5 U.S.C. Chapters 51 and 53. GS-1 through GS-15. Salaries based on substantially equal pay for substantially equal work within each local pay area. Differences in pay based on differences in work and performance and comparability to the salaries that non-Federal employers pay for work at the same level of difficulty and responsibility.

2. Prevailing Rate Employees (wage system). 5 U.S.C. §§ 5341-5349. Worker: WG-1 through WG-15. Leader: WL-1 through WL-15. There are 5 steps in each WG and WL grade. Supervisor = WS. Pay system covers trade, craft, labor, and other blue-collar jobs. Pay is based on the prevailing rates in a given local wage area. These are hourly rate employees who receive annual wage adjustments.
3. Within Grade Step Increases. Time requirements between increases. 5 C.F.R. § 531.405.
 - a. 52 calendar weeks for steps 2 to 4.
 - b. 104 calendar weeks for steps 5 to 7.
 - c. 156 calendar weeks for steps 8 to 10.
4. SES Employees. 5 U.S.C. §§ 5381-5385. ES-1 through ES-6. President sets pay rate. Minimum may not be below 120% of lowest rate for GS-15.
5. Executive Schedule. Levels I-V. Top executive salaries. Members of Cabinet, deputy secretaries, undersecretaries, assistant secretaries, etc.
6. NAF Employees. Those employees who are not paid from funds appropriated by Congress. Work in exchanges, clubs, commissaries, etc. Paid from funds derived from sales and services performed. NAFs are not considered employees for the purposes of most laws administered by OPM. DODI 1015.10; AR 215-3; SECNAV Instruction 1700.12; AFI 34-262; MCO 1700.27; AR 215-8.

Chapter B

Adverse Actions for Unacceptable Employee Performance

TABLE OF CONTENTS

I.	INTRODUCTION	2
A.	REMOVING POOR PERFORMING EMPLOYEES	2
B.	AGENCY MUST SUPPORT ITS REMOVAL ACTIONS	2
C.	PERFORMANCE EXPECTATIONS MUST BE REASONABLE.	2
II.	REFERENCES	3
III.	ACTIONS FOR UNACCEPTABLE PERFORMANCE UNDER CHAPTER 43	3
A.	EMPLOYEES COVERED.....	3
B.	EMPLOYEES NOT COVERED.....	4
C.	PERFORMANCE-BASED ACTIONS	5
IV.	PROOF REQUIREMENTS IN CHAPTER 43 UNACCEPTABLE PERFORMANCE CASES	5
A.	PROOF REQUIREMENTS GENERALLY	5
B.	SUBSTANTIAL EVIDENCE STANDARD OF PROOF	6
C.	DEMONSTRATING OPM APPROVAL OF AGENCY'S PERFORMANCE APPRAISAL SYSTEM.....	6
D.	PROVING AGENCY TOOK ALL REQUIRED ACTIONS BEFORE PROPOSING PERFORMANCE-BASED ACTION.....	7
E.	THE AGENCY FOLLOWED PROPER PROCEDURES.....	15
V.	ROLE OF MERIT SYSTEMS PROTECTION BOARD IN CHAPTER 43 UNACCEPTABLE PERFORMANCE CASES	20
VI.	OTHER PERFORMANCE BASED ACTIONS: WITHIN-GRADE ("STEP") INCREASES	21

Employee Performance

I. INTRODUCTION.

- A. Removing Poor Performing Employees. A common myth in the civil service is that it is extremely difficult, if not, impossible to discharge federal employees for poor performance or misconduct. According to a Merit Systems Protection Board (MSPB) report, from Fiscal Year 2000-2014, federal agencies discharged more than 77,000 employees for performance or misconduct issues.
- B. Agency Must Support Its Removal Actions. To take a performance-based action (e.g. a removal or reduction) against an employee under 5 U.S.C. Chapter 43, an agency must show that the employee's performance was unacceptable in at least one critical element of the employee's position after the employee was given a meaningful opportunity to improve. The burden of proof for such an action is substantial evidence, which is defined as evidence as that a reasonable person might accept as adequate to support the action, even though other reasonable persons might disagree. 5 C.F.R. § 1210.41. This is a lower burden of proof than exists in disciplinary actions for misconduct or in most civil lawsuits.
- C. Performance Expectations Must Be Reasonable. The most critical element of a performance-based action—and of performance management in general—is ensuring that each employee has an effective performance plan, which sets forth the critical elements of the employee's position and management's expectations of the employee's standards of performance. If an employee appeals a performance-based action, the agency must show that the employee's performance standards were reasonable. The critical job elements that an employee failed to meet must be reasonable, realistic, attainable, and to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria. 5 U.S.C. § 4302(b)(1). Performance standards must be measurable, e.g., in terms of quality, quantity, timeliness, or manner of performance.
 - 1. For example, the MSPB will not uphold a removal or demotion based on a standard that requires an unreasonably high level of performance. *See Hober v. Dep't of Army*, 64 M.S.P.R. 129, 131 (1994). In one such case, the MSPB found one performance standard unreasonable because it required a near perfect 98% typing accuracy for a secretary with a high volume of work. *Lewis v. Dep't of Army*, 38 M.S.P.R. 91, 96 (1988).
 - 2. Finally, an agency should not write a "backward" performance standard that describes acceptable performance in terms of what employees should not do without informing them of what they should do. Backward standards are

not in accordance with law because they do not provide accurate objective measurement of a level of achievement nor reasonably inform the employee of what is acceptable performance. *Eibel v. Dep't of Navy*, 857 F.2d 1439 (Fed. Cir. 1988).

II. REFERENCES.

- A. DOD.
 - 1. 5 U.S.C. § 4303, Actions based on unacceptable performance.
 - 2. 5 C.F.R. Part 432, Performance Based Reduction in Grade and Removal Actions.
 - 3. DoDI 1400.25, Subchapter 430, Performance Management.
- B. Army. AR 690-400, Total Army Performance Evaluation System, 16 October 1998.
- C. Air Force.
 - 1. AFI 36-1203, Administrative Grievance System, 1 May 1996.
 - 2. AFI 36-704, Discipline and Adverse Actions, 22 July 1994.
 - 3. AFI 36-1201, Discrimination Complaints, 12 February 2007.
- D. Navy.
 - 1. SECNAVINST 12410.25, Civilian Employee Training and Career Development, 5 July 2011.
 - 2. DON Civilian Human Resources Manual (CHRM), 17 January 2003.
- E. Marine Corps. MCO 12430.2, Performance Management Program, 29 December 1998. The Marine Corps Performance Management Program Order 12430.2 provides policy and responsibility for civilian performance management and a formal Performance Appraisal Review System within the Marine Corps.
- F. Coast Guard.
 - 1. COMMANDANT INSTRUCTION M12430.6B, 10 August 1998.

III. ACTIONS FOR UNACCEPTABLE PERFORMANCE UNDER CHAPTER 43.

- A. Employees Covered. 5 U.S.C. § 4301(2); 5 C.F.R. § 432.102.

Nonprobationary competitive service employees and nonprobationary preference eligible excepted service employees who have completed one year of current continuous employment in the same or similar positions or nonprobationary excepted service employees who have completed two years of current continuous employment in the same or similar positions.

B. Employees Not Covered. See 5 C.F.R. § 432.102(f).

1. An employee in the competitive service who is serving a probationary or trial period under an initial appointment;
2. An employee in the competitive service serving in an appointment that requires no probationary or trial period, who has not completed 1 year of current continuous employment in the same or similar positions under other than a temporary appointment limited to 1 year or less;
3. An employee in the excepted service who has not completed 1 year of current continuous employment in the same or similar positions;
4. Senior Executive Service (SES). See 5 C.F.R. § 359.501-504 for a discussion of performance-based actions involving career SES appointees who have completed their probationary period. Note that such actions are not appealable to MSPB under 5 C.F.R. § 359.504. A career appointee being removed from the SES under this section shall, at least 15 days before the effective date of the removal, be entitled, upon request, to an informal hearing before an official designated by the MSPB. The informal hearing shall be conducted in accordance with the regulations and procedures established by the Board. See 5 CFR 1201.141.
5. National Guard Technicians. A technician in the National Guard described in 5 U.S.C. § 8337(h)(1), employed under section 709(b) of Title 32; 5 C.F.R. § 432.102(f)(12); see also 32 U.S.C. § 709.
6. An employee outside the United States who is paid in accordance with local native prevailing wage rates for the area in which employed;
7. An individual in the Foreign Service of the United States;
8. An employee who holds a position with the Veterans Health Administration which has been excluded from the competitive service by or under a provision of Title 38, United States Code, unless such employee was appointed to such a position under section 7401(3) of Title 38;
9. An administrative law judge appointed under 5 U.S.C. § 3105;

10. An individual in the Senior Executive Service;
 11. An individual appointed by the President;
 12. An employee occupying a position in Schedule C as authorized under Part 213 of this chapter;
 13. A reemployed annuitant;
 14. An individual occupying a position in the excepted service for which employment is not reasonably expected to exceed 120 calendar days in a consecutive 12 month period; and
 15. A manager or supervisor returned to his or her previously held grade pursuant to 5 U.S.C. § 3321(a)(2) and (b).
- C. Performance-Based Actions. 5 C.F.R. Part 432. This part applies to reduction in grade and removal of employees covered by the provisions of this part based solely on performance at the unacceptable level. 5 U.S.C. § 4305 authorizes the OPM to prescribe regulations to carry out the purposes of Title 5, Chapter 43, United States Code, including 5 U.S.C. § 4303, which covers agency actions to reduce in grade or remove employees for unacceptable performance.
1. Reduction in Grade. An agency can reduce in grade or remove an employee whose performance fails to meet the established performance standards in one or more critical elements of his position. *Gonzalez v. Dep't of Transportation*, 109 M.S.P.R. 250 (2008).
 2. Removal. Failure to demonstrate acceptable performance under a single critical element will support a removal under Chapter 43. *Shuman v. Dep't of the Treasury*, 23 M.S.P.R. 620 (1984); *Hancock v. Internal Revenue Serv.*, 24 M.S.P.R. 263 (1984).

IV. PROOF REQUIREMENTS IN CHAPTER 43 UNACCEPTABLE PERFORMANCE CASES.

- A. Proof Requirements Generally. For the MSPB to sustain an agency's action in a Chapter 43 case, the agency must show by substantial evidence that:
1. The appellant's performance fails to meet the established performance standards in one or more critical elements of his position;

2. The agency established performance standards and critical elements and communicated them to the appellant at the beginning of the performance appraisal period;
 3. The agency warned the appellant of the inadequacies of his performance during the appraisal period and gave him an adequate opportunity to improve; and
 4. After an adequate improvement period, the appellant's performance remained unacceptable in at least one critical element. *Gonzalez v. Dep't of Transportation*, 109 M.S.P.R. 250 (2008), citing *Mahaffey v. Dep 't of Agriculture*, 105 M.S.P.R. 347 (2007).
- B. Substantial Evidence Standard of Proof. In every reduction in grade or removal for unacceptable performance under 5 U.S.C. Chapter 43, the agency must show by substantial evidence:
1. That OPM has approved the agency's performance appraisal system. The agency also has the burden of proving that the OPM has approved the agency's performance appraisal system if the appellant specifically raises such a challenge. *Gonzalez v. Dep't of Transportation*, 109 M.S.P.R. 250 (2008), citing *Daigle v. Dep't of Veterans Affairs*, 84 M.S.P.R. 625 (1999).
 2. That before any proposed reduction in grade or removal:
 - a. the employee was informed, in writing, of the applicable critical elements and standards of performance;
 - b. the employee was informed of the specific performance deficiencies;
 - c. the employee was given a reasonable amount of time to demonstrate acceptable performance;
 - d. the employee's performance in a critical element continued to be unacceptable despite management assistance; and
 - e. the agency followed proper procedures.
- C. Demonstrating OPM approval of agency's Performance Appraisal System.
1. The agency submitted, in the record a copy of its Performance Management Plan, as well as copies of OPM's approval letters. Those letters specifically state that OPM had approved the agency's performance management system plan including subsequent changes. The agency thus has satisfied its burden

of showing affirmatively, by substantial evidence, that it had received OPM approval before undertaking this personnel action. *Saitlin v. Dep't of Veterans Affairs*, 60 M.S.P.R. 218, 222 (1993).

2. Requirement that administrative judges routinely notify agencies to produce evidence of approval of their performance appraisal system by the OPM is no longer necessary, but if an appellant alleges that there is reason to believe that an agency is not in compliance with the law, the MSPB may require an agency to submit evidence that it has received OPM approval of its performance appraisal system. *Daigle v. Dep't of Veterans Affairs*, 84 M.S.P.R. 625 (1999).
 3. Statement in the regulation. *Chennault v. Dep't of Army*, 796 F.2d 465 (Fed. Cir. 1986) (Agency regulation, citing OPM approval of its performance appraisal system, is sufficient proof of approval to sustain agency action).
 4. Agency Affidavit. *Wood v. Dep't of Navy*, 27 M.S.P.R. 659 (1985); *Sloane v. Defense Logistics Agency*, 834 F.2d 1006, 1007-08 (Fed. Cir. 1987).
 5. OPM Letter. *Renshaw v. Dep't of Army*, 28 M.S.P.R. 638 (1985).
 6. According to AR 690-400, Chapter 4302 Total Army Performance Evaluation System (16 Oct 98), DoDI 1400.25, subchapter 430, Appendix B, is to be used as documentation of OPM approval of the DoD performance appraisal system.
 7. Stipulation. *Sloane v. Defense Logistics Agency*, 834 F.2d 1006 (Fed. Cir. 1987).
- D. Proving agency took all required actions before proposing performance –based action.
1. Employee was informed, in writing, of the applicable critical elements and standards of performance. Introduce signed and dated copy of performance plan.
 - a. Substantive right to be advised at beginning of appraisal period. 5 U.S.C. § 4303(b)(2); 5 C.F.R. § 430.204(b)(1)(ii); *Weirauch v. Department of Army*, 782 F.2d 1560 (Fed. Cir. 1986); *Vines v. Department of Defense*, 67 M.S.P.R. 667 (1995); *Cross v. Department of Air Force*, 25 M.S.P.R. 353 (1984).
 - b. Notice need not be provided on first date of annual appraisal period. *Weirauch v. Dep't of Army*, 782 F.2d at 1563.

Performance plans should be in place within 30 days from beginning of each rating period. AR 690-400, para. 1-5.

- c. What standards required? 5 C.F.R. § 430.206(b)(8). For critical elements, at least two levels for appraisal shall be used (e.g., fully successful, unacceptable) with standards written at the "fully successful" level. 5 C.F.R. § 430.206(b)(8)(i).
- d. Standards must set forth in objective terms the minimum level of performance that an employee must achieve to avoid removal. *Eibel v. Dep't of Navy*, 857 F.2d 1439 (Fed. Cir. 1988).
- e. Agency must show that the standards were reasonable, sufficient under the circumstances to permit accurate measurement of performance, and adequate to inform the employee of what was necessary to achieve a satisfactory or acceptable rating. *See, e.g., Dobson v. Dep't of Navy*, 283 Fed.Appx. 818 (2008); *Guillebeau v. Dep't of Navy*, 362 F.3d 1329, 1339 (Fed. Cir. 2004); *Wilson v. Dep't of Health and Human Services*, 770 F.2d 1048, 1052 (Fed. Cir. 1985); *Greer v. Dep't of Army*, 79 M.S.P.R. 477, 483 (1998).
- f. The agency may make the required showing through the standards themselves, or by giving content to the standards by informing the employee of specific work requirements through other methods, including while placing the employee on a Performance Improvement Plan (PIP) and even during the course of a PIP. *See, e.g., Cumberbatch v. Dep't of Labor*, 2006 MSPB LEXIS 4137 (2006); *Thompson v. Dep't of Navy*, 89 M.S.P.R. 188, 195-96 (2001); *Papritz v. Dep't of Justice*, 31 M.S.P.R. 495, 497-98 (1986).
- g. Employee participation in preparing performance requirements is encouraged. 5 C.F.R. § 430.204(c); *Smith v. Dep't of Agriculture*, 64 M.S.P.R. 46 (1994) (Employee's right to comment on proposed performance standards does not amount to veto power). Final authority for establishing performance standards rests with supervisors. 5 C.F.R. § 430.405(c).
- h. Absolute Standards. An absolute standard is one under which a single incident of poor performance will result in an unsatisfactory rating as to a critical element of a position.
- i. Statute requiring the use of "objective" job-related criteria in performance standards does not prohibit an "absolute performance standard," that is, one under which a single incident of poor performance will result in an unsatisfactory rating on a critical element, so long as the standard is objective and tailored to the specific requirements of the position. *Jackson v. Dep't of Veterans Affairs*, 97 M.S.P.R. 13 (2004); 5 U.S.C. § 4302(b)(1).

- j. Standards requiring “near perfection” in a critical element can be an abuse of discretion. *Walker v. Dep’t of Treasury*, 28
- k. M.S.P.R. 227 (1985) *overruled in part by Jackson v. Dep’t of Veterans Affairs*, 97 M.S.P.R. 13 (A performance standard that required an accounting clerk to achieve a 99.5% accuracy rate in the screening, logging, and distribution of correspondence was unreasonable); *Thompson v. Dep’t of the Navy*, 89 M.S.P.R. 188, 191 (2001). *But see Hober v. Dep’t of Army*, 64 M.S.P.R. 129 (1994).
- l. Performance standard applied to Navy human resources specialist in his performance improvement plan (PIP) allowing only two errors was not an unreasonable error rate or unobtainable. Appellant presented no specific argument as to why that number of errors, although small, represented an unreasonable error rate, nor provided any reason to believe that the required level of performance was unobtainable. *Dobson v. Dep’t of Navy*, 283 Fed.Appx. 818 (2008).
- m. Backward Standards. Writing minimally acceptable standards in terms that describe unacceptable performance is improper. *Jackson-Francis v. Dep’t of Gov’t Ethics*, 2006 M.S.P.B. 255 (2006); *Eibel v. Dep’t of Navy*, 857 F.2d 1439 (Fed. Cir. 1988); *Dancy v. Dep’t of Navy*, 55 M.S.P.R. 331 (1992); *Burnett v. Dep’t of Health and Human Services*, 51 M.S.P.R. 615 (1991) (describing unacceptable, not acceptable performance, and thus failed to inform the appellant what she had to do to attain acceptable performance, e.g. Timeliness: Material provided to staff is consistently late).
- n. Vague standards. Standards containing measurement devices like "sometimes" are so vague as to render the standards invalid. *Smith v. Dep’t of Energy*, 49 M.S.P.R. 110 (1991); *See Wilson v. Dep’t of Health and Human Services*, 770 F.2d 1048 (Fed. Cir. 1985). The standards in the *Wilson* case that were expressed in terms of minimally satisfactory performance were, essentially, measures of unacceptable performance. The court found the standards impermissibly vague because they could not be applied in a verifiable fashion and because they did not indicate the level of proficiency that the agency actually intended the phrases to mean. *See Duggan v. Dep’t of Health and Human Services*, 33 M.S.P.R. 568, 571 (1987) (the same result as to similar standards for an employee development specialist).
- o. An agency may give content to performance standards by informing the employee of specific work requirements through written instructions, information concerning deficiencies and methods of improving performance, memoranda describing unacceptable performance, and responses to the employee's

questions concerning performance. *Baker v. Defense Logistics Agency*, 25 M.S.P.R. 614, 617 (1985), aff'd 782 F.2d 1579 (Fed. Cir. 1986); e.g., *Melnick v. Dep't of Housing and Urban Dev.*, 42 M.S.P.R. 93, 98-99 (1989); See also *Thompson v. Dep't of Navy*, 89 M.S.P.R. 188, 195 (2001).

- p. The fleshing out of a standard in a PIP may not amount to rewriting the standard. *Eibel v. Dep't of Navy*, 857 F.2d 1439, 1443 (Fed. Cir. 1988).
- q. The attempt to clarify a standard through written and oral instructions may not impose a higher level of performance than was previously called for by the critical element. *Stone v. Dep't of Health and Human Services*, 38 M.S.P.R. 634, 639 (1988).
- r. Generic performance standards. Standing alone, the generic performance standards in this case do not, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria. 5 U.S.C. § 4302 (b)(1). The standards are not sufficiently precise and specific as to invoke a general consensus as to their meaning and content; and do not allow a supervisor to make a verifiable decision regarding an employee. See *Wilson v. Dep't of Health and Human Services*, 770 F.2d 1048, 1052 (Fed. Cir. 1985).
- s. *Diprizio v. Dep't of Transportation*, 88 M.S.P.R. 73 (2001) (Any lack of specificity inherent in generic performance standards was cured by the agency's providing appellant with clear guidance during the PIP as to what was expected of him).

2. Employee was informed of the specific performance deficiencies.

- a. Can be done in the PIP, if not earlier. *Bustamante v. Dep't of Air Force*, 2000 U.S. App. LEXIS 16057 (Fed. Cir. July 10, 2000) (unpublished). Appellant's contention that the PIP memorandum imposed more stringent requirements than critical element 1E is without merit. The memorandum tracks the language of the critical element, and carefully instructs the appellant how to achieve compliance with the requirements of that element.
- b. *Greer v. Dep't of Army*, 79 M.S.P.R. 477 (1998). The PIP notice itself unmistakably informed the appellant that the agency considered his performance in critical element three as "not satisfactory," "a serious failure," and to be at "the failure level." Appellant's placement on a 90-day PIP and its notice of unsatisfactory performance followed previous notice to the appellant that "you are failing to meet your performance objectives." The agency gave the appellant a reasonable opportunity to demonstrate acceptable performance before it

initiated the removal action.

- c. *Greer* distinguished by *Smith v. Dep't of Health and Human Services*, 35 M.S.P.R. 101, 104 (1987); *Colgan v. Dep't of the Navy*, 28 M.S.P.R. 116 (1985); *Grant v. Dep't of Transp., U.S. Coast Guard*, 24 M.S.P.R. 6637 (1984). In *Smith*, the agency placed the appellant on a PIP, despite its assessment of his performance as no worse than “minimally satisfactory.”
- d. In *Colgan*, the agency notified the appellant that she had 45 days to improve her performance, even though it had just found that she met the minimal performance level on all of her critical elements. In *Grant*, the agency told the appellant that he needed to improve his performance, but at the same time it indicated to him that his performance was either “fully satisfactory” or “minimally satisfactory” in the critical elements. Thus, in all three cases, the first time the appellants were formally put on notice that their performance was considered unacceptable was when their removals were proposed.
- e. Notice must advise employee of performance level required to be acceptable.
- f. *Smallwood v. Dep't of Navy*, 52 M.S.P.R. 678 (1992) (By informing the appellant at the beginning of the PIP that his task for the 90-day period was under component 4E and that he could be removed if his performance did not improve to a minimally acceptable level, the agency sufficiently notified the appellant that his unacceptable performance of component 4E would warrant a rating of unacceptable performance of Critical Element 4 as a whole). See *Luscri v. Dep't of Army*, 39 M.S.P.R. 482, 490-91 (1989), *aff'd* 887 F.2d 1094 (Fed.Cir.1989) (Table); *Shuman v. Dep't of the Treasury*, 23 M.S.P.R. 620, 628 (1984).
- g. Distinguished by *Atamantyk v. Dep't of Defense*, 49M.S.P.R. 432, 437 (1991) (In *Atamantyk*, the Board found that the agency's failure to inform the appellant that his performance under a component of a critical element was unacceptable before placing him on a PIP constituted a failure to provide him with a reasonable opportunity to improve his performance under that component. Note: The Board specifically did not hold that an agency may never base a removal on a component unless it has first noted deficiencies in that particular component. It found the agency's action improper in *Atamantyk* because the component at issue in the removal involved an entirely different set of tasks and requirements than that involved in the component cited in the PIP notice. Moreover, the decision in *Atamantyk* does not indicate that the agency informed the employee at the beginning of his PIP that he was supposed to perform particular tasks under the component tasks which were ultimately cited in his notice of proposed

removal).

- h. *Burroughs v. Dep't of Health and Human Services*, 49 M.S.P.R. 644 (1991) (The minimally successful standards used by the agency, despite the agency's efforts to clarify them, are invalid and cannot be the basis of a removal action. These elaborations, like those at issue in *Eibel*, generally are stated only in negative terms, and generally do not identify the level of performance required to meet the standard); See *Eibel v. Dep't of the Navy*, 857 F.2d 1439 (Fed.Cir.1988).
- i. Notice that performance is "marginal" is insufficient. *Colgan v. Dep't of Navy*, 28 M.S.P.R. 116 (1985) (Where employee had been rated marginal in all three critical elements, meaning that she met minimum standards for her position, at time she was informed that she had 45 days to show improved performance, and was not rated unsatisfactory until after 45-day period, removal of employee at that time violated her right to reasonable opportunity to demonstrate acceptable performance; employee was entitled to reasonable opportunity to improve after first finding of unsatisfactory performance).

- 3. Employee given reasonable amount of time to demonstrate acceptable performance.
 - a. For each critical element in which the employee's performance is unacceptable, the agency shall afford the employee a reasonable opportunity to demonstrate acceptable performance, commensurate with the duties and responsibilities of the employee's position. As part of the employee's opportunity to demonstrate acceptable performance, the agency shall offer assistance to the employee in improving unacceptable performance. 5 C.F.R. § 432.104.
 - b. Performance Improvement Plan (PIP) must be meaningful opportunity to improve. *Goodwin v. Dep't of Air Force*, 75 M.S.P.R. 204 (1997) (Agency afforded employee reasonable opportunity to demonstrate acceptable performance and did not prejudge her performance, despite evidence that some workers were told, before employee's placement on performance improvement plan (PIP), that she soon would be gone; employee did not undertake items required by critical performance element, and her supervisor did not try to sabotage her performance or decide to remove her regardless of her performance during PIP, but rather he credibly testified that he fully expected employee to demonstrate acceptable performance based on relatively simple nature of PIP tasks).
 - c. Although 5 C.F.R. § 432.104 requires agency to offer assistance to employee in improving performance, there is no mechanical

requirement regarding the form of this assistance.

- d. *Gjersvold v. Dep't of Treasury*, 68 M.S.P.R. 331, 336 (1995) (The agency's detailed guidance regarding the appellant's performance during the PIP suffers no disqualification merely because it was delivered in written form, rather than orally. Moreover, the agency repeatedly solicited the appellant's responses or questions to its evaluations, an invitation which for her own reasons the appellant apparently declined).
- e. *Goodwin v. Dep't of Air Force*, 75 M.S.P.R. 204, 208 (1997) (The agency has shown by substantial evidence that it afforded the appellant a reasonable opportunity to improve. Although the appellant claims that the agency did not provide her with training and counseling, no training was required for the items she was called upon to accomplish during the PIP. To the extent that consultation or counseling may have been needed, it needed to occur in response to the appellant's submissions of required work or in response to the appellant's questions or requests for guidance. Thus, the specific PIP requirements in this appeal distinguish it from those cases in which the Board has found that a lack of counseling deprived the employee of a reasonable opportunity to improve).
- f. *Thomson v. Farm Credit Admin*, 51 M.S.P.R. 569, 579 (1991) (Appellant did not receive promised supervisory assistance on one of the projects the agency found unacceptable during the PIP, and the appellant's supervisors predetermined that appellant was going to fail).
- g. Length of PIP. What is reasonable depends on circumstances of the case. *Diprizio v. Dep't of Transp.*, 88 M.S.P.R. 73 (2001) (60-day PIP to improve performance in two elements, which was extended for over three more months, was a reasonable time to improve).
- h. In rating an employee's performance during the PIP, the agency may use proportional or pro-rated standards to assess performance of annual numerical standards. *Brown v. Veterans Admin.*, 44 M.S.P.R. 635, 644-645 (1990). Example: If annual numerical standard is for "no more than 12 errors per annual rating period," during the 90-day PIP it may be appropriate in some cases to pro-rate the standard to "no more than 3 errors."
- i. Impact of employee improvement during this period. *Zoltowski v. Dep't of Army*, 26 M.S.P.R. 525 (1985) (Acceptable performance assessment at end of employee's improvement period demonstrated that employee met established minimum performance standards for critical elements of his job, thus precluding agency from proposing and taking a performance-based

action without providing notice of poor performance and some opportunity to improve).

- j. *Benton v. Dep't of Labor*, 25 M.S.P.R. 430 (1984) (Administrative Judge did not err in finding appellant failed to improve sufficiently during the time granted to bring her performance up to satisfactory level).
 - k. Employee must maintain acceptable performance for 1 year from beginning of PIP or no new PIP is required. 5 C.F.R. § 432.105(a)(2).
 - l. OPM's regulations provide that: An agency may propose a Chapter 43 action where, after an employee is given a reasonable opportunity to demonstrate acceptable performance, his performance during or following the opportunity to demonstrate acceptable performance is unacceptable in the critical element(s) for which the opportunity was provided; if the employee's performance in the element for which the opportunity was provided remains acceptable for a year from the beginning of the opportunity, the agency may not take a Chapter 43 action for subsequent unacceptable performance unless another opportunity is given; and a proposed action may be based on instances of unacceptable performance that occur within a 1 year period ending on the date of the notice of proposed action. See 54 Fed.Reg. 26181 (1989), codified at 5 C.F.R. § 432.105(a).
 - m. *Cockrell v. Dep't of Air Force*, 58 M.S.P.R. 211 (1993) (Agency's consideration of performance deficiencies occurring up to one year prior to issuance of notice of proposed removal was not improper on ground that agency failed to give employee performance counseling at 30-day intervals, and did not give her a 90-day advance warning of her unsatisfactory performance prior to placing her on a PIP; no rule or regulation imposed such requirements on agency). See 5 U.S.C. § 4303(b)(1); 5 C.F.R. § 432.105.
4. Employee's performance in a critical element continued to be unacceptable despite management assistance.
- a. Show substantial evidence that performance was unacceptable in at least one critical element. *Luscri v. Dep't of Army*, 39 M.S.P.R. 482, 490, aff'd 887 F.2d 1094.
 - b. (Fed. Cir. 1989); *Greer v. Dep't of the Army*, 79 M.S.P.R. 477, 485 (1998). Based on the un rebutted testimony of the Director of Propulsion describing what a research plan should contain, and considering the model research plans submitted by the agency, a

reasonable person could find that the appellant's research plans were unacceptable.

- c. Accordingly, the agency has shown by substantial evidence that the appellant's performance was unacceptable on critical element three.
- d. Evidence to prove unacceptable performance. *Bowling v.*
- e. *Dep't of Army*, 47 M.S.P.R. 379 (1991) (In performance actions taken under Chapter 43 in which an employee's performance standards are expressed in terms of a percentage of errors allowed, the Board has not required a 100 percent review of the employee's work or an accounting of every item of work, but has allowed a representative sampling of the work.); *See also Johnson v. Veteran Admin.*, 32 M.S.P.R. 443 (1987).

E. The Agency followed proper procedures. 5 C.F.R. § 432.105. Harmless Error Rule applies. 5 U.S.C. § 7701(c)(2)(A); 5 C.F.R. § 1201.56(c)(3). *Diaz v. Dep't of Air Force*, 63 F.3d 1107, 1109 (Fed. Cir. 1995) ("We see no reason to apply the Harmful Error Rule of 5 U.S.C. § 7701 to Chapter 75 removals and not to Chapter 43 removals"). *But see Stenmark v. Dep't of Transp.*, 59 M.S.P.R. 462 (1993) (Agency did not satisfy Chapter 43's procedural obligations when there was no evidence in the record of appellant's critical elements and performance standards; appellant's stipulation regarding unsatisfactory performance was insufficient to carry agency's burden); *See Cross v. Dep't of Air Force*, 25 M.S.P.R. 353 (1984), regarding what is a "procedural" matter versus substantive right.

- a. 30 days' advance written notice of the proposed action that identifies both the specific instances of unacceptable performance by the employee on which the proposed action is based and the critical element(s) of the employee's position involved in each instance of unacceptable performance. Although 5 USC § 4303(c) requires an agency to make its decision on a performance action under Chapter 43 within 30 days of the expiration of the notice period, the agency's failure to do so is procedural error, but may not be harmful error requiring reversal of the action. *See, Diaz v. Department of the Air Force*, 63 F.3d 1107 (Fed. Cir. 1995).
- b. Opportunity to Reply. The agency shall afford the employee a reasonable time to answer the agency's notice of proposed action orally or in writing.
- c. Representation. The agency shall allow the employee to be represented by an attorney or other representative.
- d. Consideration of medical condition. The agency shall allow an employee who wishes to raise a medical condition that may have

contributed to his or her unacceptable performance to furnish medical documentation of the condition for the agency's consideration.

- e. Final written decision. The agency shall make its final decision within 30 days after expiration of the advance notice period. Unless proposed by the head of the agency, such written decision shall be concurred in by an employee who is in a higher position than the person who proposed the action.

V. **ROLE OF MERIT SYSTEMS PROTECTION BOARD IN CHAPTER 43 UNACCEPTABLE PERFORMANCE CASES.**

- A. MSPB (and arbitrators if employee proceeds under negotiated grievance procedures) cannot mitigate agency action under Chapter 43. *Horner v. Bell*, 825 F.2d 382 (Fed. Cir. 1987); *Lisiecki v. Merit Systems Protection Bd.*, 769 F.2d 1558 (Fed. Cir. 1985); *Davis v. Dep't of Health and Human Services*, 58 M.S.P.R. 538 (1993); *Cook v. Equal Employment Opportunity Comm'n*, 50 M.S.P.R. 660 (1991).
- B. Standard of Proof. Substantial Evidence. 5 U.S.C. § 7701(c)(1)(A); 5 C.F.R. § 1201.56(c)(1). Substantial evidence is the degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other persons might disagree. This is a lower burden of proof than preponderance of evidence.
- C. Alternative to Chapter 43 performance problem: Use Chapter 75.
 - 1. Agencies may take adverse action based on unacceptable performance using Chapter 43 or Chapter 75 procedures. *Lovshin v. Dep't of Navy*, 767 F.2d 826 (Fed. Cir. 1985); *Mahaffey v. Dep't of Agric.*, 105 M.S.P.R. 347 (MSPB 2007) *See Fairall v. Veterans Admin.*, 844 F.2d 775, 76 (Fed. Cir. 1987) (Chapter 75 action can be entirely or partially performance- based).
 - 2. An agency may not process an action under Chapter 43 and then change the theory of its case to Chapter 75 after hearing, by which point it has determined that it has not complied with all Chapter 43 requirements. *Shorey v. Dep't of Army*, 77 M.S.P.R. 239 (1998), *citing Ortiz v. U.S. Marine Corps*, 37 M.S.P.R. 359 (1988).
 - 3. Chapter 43 standards cannot be applied to a Chapter 75 case. A specific standard of performance need not be established and identified in advance for the appellant in a performance action brought under Chapter 75. Rather, when an agency takes such an action under Chapter 75, it must simply prove that its measurement of the appellant's performance was both accurate and reasonable. *Shorey v. Dep't of Army*, 77 M.S.P.R. 239 (1998), *citing Moore v. Dep't of*

Army, 59 M.S.P.R. 261, appeal dismissed, 16 F.3d 422 (Fed. Cir. 1993).

- D. Whistleblower allegations. *Jones v. Dep't of Health and Human Services*, 15 Fed. Appx. 896 (2001) (unpublished) (Employee performing at unacceptable level in at least two critical elements; therefore, agency would have removed him absent any disclosures protected by Whistleblower Protection Act).
- E. Court of Appeals for the Federal Circuit (CAFC). CAFC has limited scope of review of MSPB decisions. CAFC will affirm unless agency decision is (1) arbitrary, capricious, or abuse of discretion, (2) obtained without procedure required by law, rule, or regulation, or (3) unsupported by substantial evidence.
5
U.S.C. § 7703(c). *Cleland v. Office of Pers. Mgmt.*, 984 F.2d 1193, 1194 (Fed. Cir. 1993). The court does not review the facts afresh. *Bevans v. Office of Pers. Mgmt.*, 900 F.2d 1558, 1565 (Fed. Cir. 1990).

VI. OTHER PERFORMANCE BASED ACTIONS: WITHIN-GRADE ("STEP") INCREASES (WIGI). 5 U.S.C. § 5335(A); 5 C.F.R. §§ 531.401-531.414.

- A. Conditions for Granting. 5 C.F.R. § 531.404.
 - 1. Time requirements between increases. 5 C.F.R. § 531.405.
 - (a) 52 calendar weeks for steps 2 to 4.
 - (b) 104 calendar weeks for steps 5 to 7.
 - (c) 156 calendar weeks for steps 8 to 10.
 - 2. No other equivalent increase during the waiting period.
 - 3. Employee performance at an acceptable level of competence (ALOC)--most recent performance rating of record at least level 3 ("fully successful").
- B. Withholding Step Increases.
 - 1. Negative determination. 5 C.F.R. § 531.409(e)(2). Employee must show an acceptable level of competence (ALOC). 5 U.S.C. § 5335(a); *Munson v. Merit Systems Protection Bd.*, 318 F.3d 1358, 1361 (Fed. Cir. 2003).
 - 2. Agency not required to offer employee opportunity to demonstrate acceptable performance before denying within-grade increase. *Bowden v. Dep't of Army*, 59 M.S.P.R. 662 (1993) (an agency must provide an employee with an opportunity to improve when, on the basis of a

performance rating, an agency contemplates reassignment, reduction in grade, or removal, but not when it contemplates a denial of a WIGI); *See also Lance v. Dep't of Energy*, 28 M.S.P.R. 467 (1985); *Wilson v. Dep't of Agric.*, 28 M.S.P.R. 472 (1985) (agency had no obligation to provide employee opportunity to demonstrate acceptable performance prior to denying increase).

3. Agency not required to base decision to deny within-grade increase on employee's performance during entire waiting period. 5 C.F.R. § 531.409(b). *Hudson v. Dep't of Army*, 49 M.S.P.R. 202 (1991) (Agency denied the employee's WIGI based on performance rating issued before the employee's entire waiting period elapsed. A denial of a WIGI based on a rating of record for a period less than the full waiting period was acceptable because it was made pursuant to the most recent rating of record); distinguished by *Bowden v. Dep't of Army*, 59 M.S.P.R. 662 (1993) (addressing the issue of whether an agency's failure to base its determination on a rating of record was harmful procedural error).
2. Reconsideration. *Shaishaa v. Dep't of Army*, 58 M.S.P.R. 450 (1993) (MSPB can exercise jurisdiction over appeal of withholding of WIGI only if agency has affirmed its initial determination upon reconsideration or has unreasonably refused to act on request for reconsideration). If the agency denied the request for reconsideration because it was filed late, the MSPB will review the record to determine whether the denial was unreasonable or an abuse of discretion. If appellant does not present sufficient evidence that would have warranted extending the deadline, the MSPB lacks jurisdiction over the appeal. *Priselac v. Dep't of Navy*, 77 M.S.P.R. 332 (1998); *Mozqueda v. Dep't of Defense*, 54 M.S.P.R. 152 (1992).
3. Appeal and grievance rights.
 - (a) MSPB. When a determination is made ... that the work of an employee is not of an acceptable level of competence, the employee is entitled to prompt written notice of that determination and an opportunity for reconsideration of the determination within his agency under uniform procedures prescribed by OPM. If the determination is affirmed on reconsideration, the employee is entitled to appeal to the Merit Systems Protection Board. 5 U.S.C. § 5335; *See also* 5 C.F.R. § 1201.3(a)(5).
 - (1) *Dockery v. Fed. Deposit Ins. Corp.*, 64 M.S.P.R. 458 (1994) (an "employee is entitled to appeal to the Merit Systems Protection Board" from a reconsideration decision affirming the withholding of a within-grade increase).
 - (2) *Jones v. Dep't of Air Force*, 29 M.S.P.R. 241 (1985). Although the grievance was submitted within the time limit for filing a reconsideration request, appellant did not request reconsideration of the negative determination, as specified in the written notice provided her, by submitting a

written request to the designated reconsideration official setting forth the reasons for reconsideration. Thus, the case was properly dismissed for appellant's failure to carry her burden of proof on the issue of the Board's jurisdiction over this appeal. The Board found that pursuit of the grievance by the appellant through the grievance procedure was not in compliance with the regulatory requirement for requesting reconsideration. *See* 5 C.F.R. § 531.410(a)(1). *Cf. Fye v. U.S. Postal Service*, 3 M.S.P.R. 315 (1980) (pursuit of a grievance does not constitute good cause for an untimely appeal to the Board).

(3) *Jones* is distinguishable from *Gerard v. Dep't of Transp.*, 7 M.S.P.R. 40 (1981), where the Board found that the agency improperly denied a specific, timely-filed reconsideration request of a negative determination because, in that case, although the request was not addressed to the proper reconsideration official, the agency's negative-determination letter did not state that the request had to be submitted to the reconsideration official.

(b) Negotiated grievance procedure (NGP). Employee in bargaining unit must use NGP, unless denials of step increases are not covered by grievance and arbitration provisions. *Munson v. Merit Systems Protection Bd.*, 216 F.3d 1037 (Fed. Cir. 2000) (5 U.S.C. § 7121(a) did not restrict MSPB's jurisdiction to hear denial of WIGI when grievance procedures were not negotiated in accordance with applicable statutes); *Espenschied v. Merit Systems Protection Bd.*, 804 F.2d 1233 (Fed. Cir. 1986) (If employee covered by collective bargaining agreement that provides grievance procedures for WIGI denials, MSPB lacks jurisdiction to review the denial).

4. MSPB (and Arbitrator) Review.

(a) Agency failure to provide employee access to documents forming basis for negative acceptable level of competence determination is harmful procedural error. *Fagan v. Dep't of Navy*, 25 M.S.P.R. 87 (1984).

(b) MSPB Standard of Review of denial of WIGI - Substantial Evidence. *Romane v. Defense Contract Audit Agency*, 760 F.2d 1286 (Fed. Cir. 1985) (appropriate standard for review of the Merit Systems Protection Board of an agency's decision to withhold employee's scheduled within-grade pay increase is substantial evidence); *See also Harvey v. Dep't of Navy*, 65 M.S.P.R. 120 (1994); *Grant v. Dep't of Air Force*, 61 M.S.P.R. 370 (1994).

Chapter C

Employee Discipline for Misconduct

TABLE OF CONTENTS

I.	INTRODUCTION	2
II.	DISCIPLINARY ACTIONS FOR MISCONDUCT	3
A.	REFERENCES.....	3
B.	TYPES OF ACTIONS.....	3
C.	PROCEDURAL REQUIREMENTS IN MISCONDUCT ACTIONS	4
III.	SELECTED ISSUES REGARDING PREDECISIONAL PROCEDURAL RIGHTS	9
A.	DUTY STATUS DURING THE ADVANCE NOTICE AND REPLY PERIOD.....	9
B.	SHORTENING THE 30-DAY ADVANCE NOTICE/REPLY PERIOD.....	10
C.	INDEFINITE SUSPENSION PENDING DISPOSITION OF CRIMINAL CHARGES	12
D.	PROPER ROLE OF PROPOSING AND DECIDING OFFICIALS.....	15
E.	EX PARTE COMMUNICATIONS.....	15
F.	EMERGENCY FURLOUGHS.....	15
IV.	PROOF REQUIREMENTS IN MISCONDUCT ACTIONS.....	16
A.	PROOF REQUIREMENTS GENERALLY.....	16
B.	PROVING THE EMPLOYEE COMMITTED THE MISCONDUCT	16
C.	PROVING THE NEXUS BETWEEN THE MISCONDUCT AND THE EFFICIENCY OF THE SERVICE.....	18
D.	DEMONSTRATING PENALTY CHOICE IS APPROPRIATE.....	21
E.	HARMFUL PROCEDURAL ERROR.....	26
V.	SPECIAL DISCIPLINARY SITUATIONS.....	27
A.	ADVERSE ACTION BASED ON REVOCATION OF SECURITY CLEARANCE	27
B.	INVOLUNTARY RESIGNATION/RETIREMENT	28
C.	INVOLUNTARY DOWNGRADING.....	28
D.	INVOLUNTARY TRANSFERS.....	29
E.	NO RIGHT TO LIE.....	29
F.	UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT.....	30
G.	BURDEN OF PROOF IN USERRA CASES.....	30
VI.	AVENUES EMPLOYEE MAY PURSUE OTHER THAN MSPB.....	30
VII.	CONCLUSION	31

Employee Discipline for Misconduct

I. INTRODUCTION.

- A. Both 5 U.S.C. 7512 and 5 U.S.C. 7513(d) place within the MSPB's jurisdiction an employee's removal, suspension for more than 14 days, reduction in grade, reduction in pay, and a furlough of 30 days or less. For actions excluded *see* 5 C.F.R. § 752.401(b).
1. It should be noted that although we will refer to adverse actions as the disciplinary cases within the MSPB's ordinary appellate jurisdiction, Chapter 75 of Title 5 of the U.S. Code is entitled "Adverse Actions," and within Chapter 75 are: Subchapter I, defining procedures to be followed for suspensions of 14 days or less; Subchapter III, involving actions against administrative law judges; Chapter IV, concerning actions taken against employees for reasons of national security; and Subchapter V, covering actions involving members of the Senior Executive Service.
 2. Under Office of Personnel Management (OPM) regulations, 5 C.F.R. §§ 752.201-03, covering suspensions of less than 14 days, refer to "actions covered," while the regulations describing the more severe disciplinary actions with the MSPB's jurisdiction, 5 C.F.R. §§ 752.401-06, refer to "adverse actions" covered. Nuance and linguistics aside, our references to adverse actions in this chapter will be to the several actions specifically placed within the MSPB's jurisdiction by statute.
- B. A decision to discipline a federal employee through an adverse action must have a rational basis. *Kmiec v. Dep't of Army*, 29 M.S.P.R. 673, 676 (1986). There must also be an actual adverse decision. On occasion an agency may take the steps to remove an employee, but then separate the employee through other means, e.g., a Reduction-in-Force (RIF). The MSPB may need to sort through the chronology of events and the attendant paperwork and circumstances to determine the basis, if any, of its jurisdiction over the employee's appeal. *See Martin v. Dep't of Navy*, 61 M.S.P.R. 21, 25 (1994) (a removal for physical inability to perform work was superseded by a RIF).
1. To sustain an adverse action, the agency must prove by preponderant evidence that the charged conduct occurred, that a nexus exists between the conduct and service efficiency, and that the penalty is reasonable. *Pope v. United States Postal Serv.*, 114 F.3d 1144, 1147 (Fed. Cir. 1997); *see Sarratt v. United States Postal Serv.*, 90 M.S.P.R. 405 (2001) (restating the rule and adding that once the agency learns that employee is fit for duty, the employee must be restored immediately to active duty status).

2. *Gregory v. Dep't of Educ.*, 16 M.S.P.R. 144, 146 (1983) (when the agency proves its charges and shows a nexus between the charges and *service efficiency*, the Board makes a separate determination concerning the penalty); *Healy v. USPS*, 9 M.S.P.R. 635, 636 (1982) (restating rule); *Williams v. USPS*, 5 M.S.P.R. 5, 7 ("In every appeal from an adverse action, this Board is mandated to determine both that the alleged employee misconduct has in fact occurred, and that the disciplinary action taken against the employee will promote the efficiency of the service").

II. DISCIPLINARY ACTIONS FOR MISCONDUCT.

- A. References. 5 U.S.C. §§ 7501-7514; 5 C.F.R. Part 752; AR 690-700, Ch. 751; AFI 36-704; SECNAVINST 12752.1; MCO 12000 series (Civilian Personnel).
- B. Types of actions.
 1. Informal Actions. Used to correct minor misconduct or delinquency. Normally the first step in progressive discipline for behavioral offenses.
 - a. Examples: oral admonitions; written warnings; and oral reprimands.
 - b. Supervisors should document informal actions (e.g., in a Memorandum for Record).
 2. Formal Actions. Range from letters of reprimand to removal from service.
 - a. Written reprimands. Formal disciplinary letter used to correct significant misconduct or delinquency and repeated lesser offenses.
 - b. "Minor" (nonappealable) adverse actions. 5 U.S.C. § 7502; 5 C.F.R. §§ 752.201-203.
 - (1) Suspension. Action that places employee in a non-duty/non-pay temporary status for disciplinary reasons.
 - (2) Suspension for 14 days or less. Nonappealable. (Suspensions of greater than 14 days are discussed below).
 - (3) Counted in calendar days, not workdays. 5 C.F.R. § 752.201(d)(1), § 752.402.
 - c. "True" (appealable) adverse actions. 5 U.S.C. § 7512; 5 C.F.R. §§ 752.301-406.
 - (1) Suspension for more than 14 days.
 - (2) Removal.

- (3) Reduction in grade or pay.
- (4) Furloughs. Furloughs for 30 days or less are adverse actions, but are used for nondisciplinary reasons. Furloughs for more than 30 days are governed by RIF procedures.

C. Procedural requirements in misconduct actions.

1. Informal Actions (e.g., oral admonitions, written warnings, and oral reprimands). AR 690-700, Ch. 751, para. 1-3a.
 - a. Applicability. Procedural requirements apply to all employees regardless of status.
 - b. Procedures. The supervisor will advise the employee of the specific infraction or breach of conduct and when and where it occurred. The employee should be allowed to explain his or her side of the incident. The supervisor will then advise the employee that continued violations may result in formal disciplinary action.
 - c. Process is oral, but document in Memorandum for Record. *No* record is placed in employee's official personnel file.
2. Letters of Reprimand.
 - a. Applicability. Procedural requirements apply to all employees regardless of status.
 - b. Procedures.
 - (1) Pre-reprimand. Supervisor obtains all reasonably available and relevant information to determine if reprimand is warranted. Supervisor may interview employee but does not have to.
 - (2) No right to counsel.
 - (3) Written decision. In accordance with AR 690-700, para. 3-2, the written reprimand normally contains the following information (not all apply in every case):
 - (a) Sufficiently detailed description of the violation, infraction, conduct or offense for which the employee is being reprimanded to enable the employee to fully understand the charge against him/her. Specifics like time, place, date, and description of the incident should be included;
 - (b) Statement that the reprimand will be made a matter of record and incorporated in the employee's OPF.

Statement will give the specific period of time that disciplinary action will remain in OPF (not to exceed 3 years);

- (c) Summary of previous offenses (if any);
 - (d) A warning that future misconduct may result in more severe disciplinary action;
 - (e) Advice regarding services or assistance (such as the EAP) available to the employee to help overcome the deficiency and avoid future recurrences. Employee will be informed regarding any specific action require on his or her part; and
 - (f) Information on the appropriate grievance channel the employee may use to contest the reprimand.
- (4) Preparation of formal written reprimands. Should always be done in coordination with Civilian Personnel Advisory Center (Human Resources Office or Civilian Personnel Office) and labor counselor.
 - (5) Filing determination. Reprimand is placed in employee's official personnel file. Length of filing is determined by imposing official, but not to exceed 3 years. AR 690-700, Ch. 751, para. 3-2(c).
3. Suspensions of 14 days or less.
- a. Applicability. Predecisional procedural protections apply to nonprobationary competitive service employees, nonprobationary excepted service employees, and nonprobationary preference eligible excepted service employees. 5 U.S.C. § 7511(a)(1)(B) & (C).
 - b. Procedures. 5 U.S.C. § 7503(b); 5 C.F.R. § 752.203.
 - (1) Advance written notice stating specific reasons for proposed suspension.
 - (2) Right to review material relied on by management to support the action.
 - (3) Reasonable time to submit written and oral reply (not less than 24 hours).
 - (4) Right to representation.
 - (a) Attorney or other representative.

- (b) Agency may disallow an employee's representative if the representation would cause a conflict of interest with the representative's duties or if the representation would interfere with the representative's duties with the agency.
 - (5) Final written decision that considers the employee's response.
 - c. Substantive Standard. Suspend *"for such cause as will promote the efficiency of the service."* 5 U.S.C. § 7503(a).
 - d. Suspensions of 14 days or less are not appealable to the Merit Systems Protection Board (MSPB). Employee may use grievance procedure to challenge the suspension. 5 C.F.R. § 752.203(f).
 - e. Consecutive suspensions. There is no MSPB jurisdiction if an employee is suspended for two consecutive periods totaling more than 14 days, so long as the suspensions arise out of separate events and circumstances. They cannot be combined to constitute a single suspension for determining jurisdiction. *Jennings v. MSPB*, 59 F.3d 159 (Fed. Cir. 1995).
4. "True" or Appealable Adverse Actions. Reductions in pay or grade, suspensions for more than 14 days, furlough for 30 days or less, and removals. 5 U.S.C. §§ 7511-7514.
- a. Applicability. Predecisional procedural protections apply only to:
 - (1) Nonprobationary competitive service employees, and
 - (2) Nonprobationary-equivalent excepted service employees. Excepted service employees are nonprobationary-equivalent if they are preference eligible and have completed one year of continuous service or are nonpreference eligible and have completed 2 years of continuous service.
 - (a) The Civil Service Due Process Act, 104 Stat. 461 (1990), amended the statutory definition of "employee" (5 U.S.C. § 7511(a)(1)) to include excepted service, nonpreference eligible employees who have completed 2 years of current continuous service in the same or similar position.
 - (b) Note: Some civilian intelligence personnel are excluded and do not get certain pre-decisional and post-decisional rights. See 5 C.F.R. § 752.401(d)(9) (Nonpreference eligibles with NSA, DIA, or an intelligence activity of a military department

covered under 10 U.S.C. § 1601, et seq.).

- b. Procedures. 5 U.S.C. § 7513; 5 C.F.R. § 752.404.
 - (1) 30 days' advance written notice. (Unless "Crime Exception" applies, discussed below).
 - (2) Right to review material relied on by management to support the action.
 - (3) At least 7 days to submit written and oral reply.
 - (4) Optional agency hearing.
 - (5) Right to representation (attorney or other).
 - (6) Final written decision that considers employee's response.
- c. Substantive Standard. Management takes the action "for such cause as will promote the efficiency of the service" (i.e., a nexus). 5 U.S.C. § 7513(a).
- d. Notice of Proposed Removal.
 - (1) The proposal letter must include all charges, all specifications, penalty factors, and allow for the employee to make an informed reply. Before an agency may terminate an employee, it must give the employee advanced written notice "stating the specific reasons for the proposed action. The notice must be sufficient to place the employee on notice of "the claims with which he is being charged so that he may adequately prepare and present a defense before the agency." *Burroughs v. U.S. Dep't of Army*, 96 F.3d 1451, 1451 (9th Cir. 1996).
 - (2) Harmful Error. *Brown v. U.S. Postal Service*, 47 M.S.P.R. 50, 57 (1991) (harmful error by agency - Agency committed harmful procedural error when its notice of proposed removal and letter of decision failed to provide Postal Service employee with specific and timely notice of charge of contributing to delinquency of a craft employee, which charge agency raised on day before hearing, depriving employee of opportunity to defend himself against charge).
- e. Advance written notice and opportunity to respond are fundamental procedural due process rights. *Howarth v. U.S. Postal Serv.*, 77 M.S.P.R. 1 (1997).
- f. Postdecisional Rights. Nonprobationary competitive service and nonprobationary-equivalent excepted service employees can appeal "true" adverse actions to the MSPB under Chapter 75. 5 U.S.C. § 7513(d); 5 C.F.R. § 752.405.

- (1) Not appealable under Chapter 75 (5 U.S.C. § 7512):
 - (a) Suspension or removal under 5 U.S.C. § 7532 in the interests of national security;
 - (b) Reduction-in-Force under 5 U.S.C. § 3502;
 - (c) Reduction in grade of supervisor or manager who has not completed the one-year supervisory probationary period, if such reduction is to the grade held immediately before becoming supervisor/manager under 5 U.S.C. § 3321(a)(2); or
 - (d) Reduction in grade or removal for unacceptable performance under Chapter 43 (5 U.S.C. § 4303).

- g. Limited procedural and substantive due process for probationary and probationary-equivalent employees.
 - (1) Probationary competitive service and probationary preference eligible excepted service employees.
 - (a) Only entitled to written notice stating the reasons for the removal and the effective date of the separation. 5 C.F.R. § 315.804.
 - (i) *Unless* the action is based on incidents arising before appointment to civil service (e.g., lied on job application), in which case the employee is entitled to advance written notice, an opportunity to respond in writing, and a final written decision. 5 C.F.R. § 315.805; *Milanak v. Dep't of Transp.*, 90 M.S.P.R. 219 (2001).
 - (b) MSPB Appeals.
 - (i) Probationary employees terminated based on incidents arising before or after their appointment may appeal their removal to the MSPB if the removal was based on partisan political reasons or marital status. 5 C.F.R. § 315.806(b); *Hunter v. Dep't of Justice*, 73 M.S.P.R. 290, 293 (1997).
 - (ii) Probationary employees terminated based on incidents arising before their appointment may also appeal to the MSPB for defects in the procedures required by 5 C.F.R. § 315.805: advance written notice of the proposed adverse action including the reasons for the action; a reasonable time to

respond to the notice in writing and to have the response considered by the agency in making its decision; and written notice of the decision at or before the effective date of the action, informing the employee of the reasons for the decision and providing information about appeal rights.

- (2) Probationary-equivalent excepted service employees (those who are not preference eligible and have less than 2 years continuous service).
 - (a) These employees receive no predecisional rights in any disciplinary action.
 - (b) MSPB Appeals. Like probationary employees, probationary-equivalent excepted service employees can only appeal their removal to the MSPB if the removal was based on partisan political reasons or marital status. *Polite v. Dep't of Navy*, 49 M.S.P.R. 653 (1991).
- (3) National Guard Technicians. No MSPB jurisdiction to hear appeals of adverse actions. MSPB also does not have authority to hear National Guard Technician whistleblower reprisal cases under 5 U.S.C. § 1221. *Singleton v. Merit Systems Protection Bd.*, 244 F.3d 1331 (Fed. Cir. 2001).
- (4) Term Employment. An agency may make a term appointment for a period of more than one year but not more than four years to positions where the need for an employee's services is not permanent. 5 C.F.R. § 316.301. The first year of service of a term employee is a "trial period" regardless of method of appointment. The Agency may terminate a term employee at any time during the trial period. The term employee is entitled to the same procedures set forth for "probationary" employees as discussed in 5 C.F.R. § 315.804 and § 315.805.

III. SELECTED ISSUES REGARDING PREDECISIONAL PROCEDURAL RIGHTS.

- A. Duty status during the advance notice and reply period.
 1. General Rule. Under ordinary circumstances, an employee whose removal or suspension, including indefinite suspension, has been proposed shall remain in a duty status in his or her regular position during the advance notice period. 5 C.F.R. § 752.404(b)(3).

2. In those rare circumstances where the agency determines that the employee's continued presence in the workplace during the notice period may pose a threat to the employee or others, result in loss of or damage to Government property, or otherwise jeopardize legitimate Government interests, the agency may elect one or a combination of the following alternatives:
 - a. Assign employee to duties for which employee does not pose a threat to safety, the agency mission, or Government property;
 - b. Place employee on annual leave (with employee's consent);
 - c. Place employee on sick leave (only if there is medical documentation of physical or mental incapacitation);
 - d. Place employee on leave without pay or in an absent without leave status, if the employee is absent for reasons not originating with the agency;
 - e. Invoke the shorter notice period, if the "Crime Exception" is applicable (see below); or
 - f. Place employee on paid nonduty status for the whole notice period.
- B. Shortening the 30-day advance notice/reply period in "true" adverse actions-the "Crime Exception." 5 U.S.C. § 7513(b)(1); 5 C.F.R. § 752.404(d)(1).
1. Basis: Reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed. Statute does *not* require agency to prove the criminal charge prior to invoking the shortened, **7-day** notice period. *Knuckles v. Bolger*, 654 F.2d 25 (8th Cir. 1981) (Agency had reasonable grounds, despite employee's subsequent acquittal in criminal court).
 2. Reasonable Cause. The information relied upon by the agency at the time it invokes a shortened notice period controls the validity of the action. If the agency did not have reasonable cause at the time it imposed the discipline, later conviction of the employee for criminal conduct does not retroactively validate the shortened notice period. See *Benton v. Dept. of the Army*, 13 M.S.P.R. 357, 359 (1982).
 - a. Indictment is sufficient for agency's reasonable cause. A criminal indictment provided a valid basis for reasonable cause. *Smith v. Government Printing Office*, 60 M.S.P.R. 450 (1994); See also *Pararas-Carayannis v. Dep't of Commerce*, 9 F.3d 955 (Fed. Cir. 1993); *Dalton v. Dep't of Justice*, 66 M.S.P.R. 429 (1995).
 - b. Investigation. Indefinite suspension actions may properly be based upon sufficient evidence of "reasonable cause" that is adduced in

agency investigations. *Bell v. Dep't of Treasury*, 54 M.S.P.R. 619 (1992). See also *Canevari v. Dep't of the Treasury*, 50 M.S.P.R. 311 (1991) (The agency could place an employee on indefinite suspension pending completion of its own investigation into possible criminal misconduct, and could then proceed with an adverse action after termination of an investigation by a law enforcement agency).

- c. Arrest. An arrest, by itself, does not provide a valid basis reasonable cause. *Dunnington v. Dep't of Justice*, 956 F.2d 1151 (Fed. Cir. 1992). Like investigation, arrest alone is insufficient. *Ellis v. Dep't of Veterans Affairs*, 60 M.S.P.R. 681 (1994). *Reid v. U.S. Postal Serv.*, 54 M.S.P.R. 648 (1992); *Dunnington v. Dep't of Justice*, 956 F.2d 1151, 1157 (Fed. Cir. 1992) (Where an arrest warrant was issued based on a magistrate's finding of probable cause, the agency still must assure itself that the surrounding facts are sufficient to justify the summary action by the agency).
- d. Warrant. A warrant for an employee's arrest, standing by itself, did not provide a valid basis for reasonable cause. *Barresi v. United States Postal Serv.*, 65 M.S.P.R. 656 (1994).
- e. Combination of circumstances giving rise to reasonable cause.
 - (1) *Honeycutt v. Dep't of Labor*, 22 M.S.P.R. 491 (1984) (Agency knew that employee had been arrested for first-degree assault and public drunkenness, that victim had been shot in neck and hand, and that while employee set forth claim that he acted in self-defense, he also told supervisor that he was too drunk to remember what happened on the night of shooting); See *Backus v. Office of Personnel Mgmt.*, 22 M.S.P.R. 457 (1984).
 - (2) But see *Ellis v. Dep't of Veterans Affairs*, 60 M.S.P.R. 681 (1994) (Employee's arrest for murder after he shot and killed a customer in his bar, newspaper article reporting the arrest, and the employee's admission to his supervisor that he killed someone did not give the agency "reasonable cause" to believe that the employee had committed a crime for which sentence of imprisonment could be imposed when newspaper article provided few details of underlying incident, and it was unclear whether employee confessed that he committed murder or simply stated that he acted in self-defense).
- f. Result: Employee's normal 30-day notice period is shortened to 7 days.
- g. Duty status: If necessary, employee may be placed in a nonduty status for time necessary to complete action.

- h. The shortened notice period may be used in combination with an indefinite suspension pending disposition of criminal charges (see below). *Engdahl v. Dep't of Navy*, 900 F. 2d 1572 (Fed. Cir. 1990).

C. Indefinite suspension pending disposition of criminal charges.

1. OPM regulations at 5 C.F.R. § 752.402(e) permit agencies to place employees on indefinite suspension pending the completion of investigation or criminal proceedings when the agency has reasonable cause to believe the employee has committed a crime for which the employee could be imprisoned. In using this procedure, however, agencies must meet the "reasonable cause" standard imposed by the MSPB and courts, and must terminate the suspension promptly upon completion of the event it identified when imposing the suspension; i.e., usually its own investigation or a criminal proceeding.
2. "Indefinite suspension" means the placing of an employee in a temporary status without duties and pay pending investigation, inquiry, or further agency action. The indefinite suspension continues for an indeterminate period of time and ends with the occurrence of the pending conditions set forth in the notice of action that may include the completion of any subsequent administrative action. 5 C.F.R. § 752.402(e).
3. Due Process Rights. The employee is entitled to the same predecisional rights as in any disciplinary action. 5 U.S.C. § 7513.
4. Agency may suspend employee indefinitely to allow examination of criminal misconduct if:
 - a. The agency has reasonable cause to believe employee has committed a crime for which imprisonment may be imposed;
 - b. There is a nexus between the criminal charge and the "efficiency of the service" (the "nexus" requirement, for the purpose of whether an agency has shown that its action promotes the "efficiency of the service," means there must be a clear and direct relationship between the articulated grounds for an adverse action and either the employee's ability to accomplish his duties satisfactorily or some other legitimate government interest); and
 - c. The suspension has an ascertainable end ("a determinable condition subsequent that will bring the suspension to a conclusion"). 5 U.S.C. §§ 7513(a) and (b)(1); *Cooper v. Dep't of Health and Human Services*, 80 M.S.P.R. 612 (1999).
5. Nature of Indefinite Suspension Action.
 - a. Temporary--to allow examination of alleged criminal misconduct. 5 C.F.R. § 752.402. The indefinite suspension continues for an indeterminate period of time and ends with the occurrence of the

pending conditions set forth in the notice of action that may include the completion of any subsequent administrative action. 5 C.F.R. § 752.402(e).

b. Suspension must state a valid condition subsequent that will terminate the suspension (completion of criminal trial or completion of agency investigation). *Jones v. Dept. of the Army*, 68 M.S.P.R. 398 (1995); *Johnson v. U.S. Postal Serv.*, 37 M.S.P.R. 388 (1988); *Dunnington v. Dep't of Justice*, 956 F.2d 1151, 1156 (Fed. Cir. 1992) (Suspension must be terminated within reasonable time following resolution of criminal charge).

c. A valid indefinite suspension has an ascertainable end, which is a condition subsequent that can be determined and will bring the suspension to a conclusion. The suspension can extend through the completion of both a pending investigation and any subsequent administrative action. The passage of one year, by itself, does not render an otherwise properly effected indefinite suspension improper. *Drain v. Dep't of Justice*, 108 M.S.P.R. 562 (2008).

(1) In cases where there are two conditions subsequent, i.e., the resolution of the criminal charges and the resolution of any further proposed adverse action deemed appropriate, the MSPB has recognized that an indefinite suspension may be continued where the employing agency moves expeditiously to initiate an adverse action as of the date of the indictment's dismissal. *Hernandez v. Dep't. of Justice*, 35 M.S.P.R. 669, 671-72 (1987).

(2) If condition subsequent is completion of agency investigation, suspension is not appropriate if investigation of misconduct is completed before suspension is imposed. *Giacobbi v. United States Postal Serv.*, 30 M.S.P.R. 39 (1986); *Littlejohn v. United States Postal Serv.*, 25 M.S.P.R. 478 (1984).

(3) *Thompson v. Dept. of Justice*, 51 M.S.P.R. 43 (1991) (Indefinite suspension was improper because the agency effected it after the criminal charges against the appellant were disposed of, and there was no evidence that the agency conducted, or needed to conduct, any additional investigation).

6. Action when criminal charges resolved (or agency investigation is terminated). Agency must take prompt action to:

a. Reinstatement of the employee.

(1) The indefinite suspension should be terminated, and the employee reinstated, as of the date of the indictment's

dismissal because there is simply no basis for continuation of the suspension as of that time, in the absence of any decision by the agency to initiate an additional adverse action. See *Jarvis v. Dep't of Justice*, 45 M.S.P.R. 104, 112 (1990); *Lund v. Dep't of Defense*, 41 M.S.P.R. 115, 119 (1989); *Hernandez v. Dep't of Justice*, 35 M.S.P.R. 669, 671-72 (1987).

- (2) Reinstatement. Where agency suspended employee pending disposition of criminal charges against him or resolution of any further proposed adverse action deemed appropriate, but agency waited 60 calendar days from date on which criminal charge was dismissed to date on which it issued its notice of proposal to remove employee based on misconduct underlying the charge, agency failed to prove that it terminated suspension promptly, and thus employee was entitled reversal of suspension as of date of dismissal of criminal charge. *Hernandez v. Dep't of Justice*, 35 M.S.P.R. 669 (1987).
- (3) Effect of reinstatement on the indefinite suspension--Back Pay issue. *Richardson v. U.S. Customs Serv.*, 47 F.3d 415 (Fed. Cir. 1995) (Holding that agency has discretion to award *or not award back pay* upon reinstatement from indefinite suspension); *Jones v. Dep't of Navy*, 51 M.S.P.R. 607 (1991), *aff'd*, 978 F.2d 1223 (Fed. Cir. 1992).

b. Initiate action to remove the employee.

- (1) Agency may proceed with removal action based on underlying misconduct even if employee is acquitted.
 - (a) It is not necessary for petitioner to be convicted of a criminal offense for the agency's removal to be sustained. *Smith v. United States Postal Serv.*, 789 F.2d 1540 (Fed. Cir. 1986) (stating that dismissal of criminal charges does not weaken an agency's case of removal); see *Serrano v. United States*, 222 Ct.Cl. 52, 612 F.2d 525, 530, (1979) (noting that an acquittal of charges at court martial did not preclude agency from independently determining whether an employee acted improperly).
 - (b) Further, the agency is in no way estopped from imposing an adverse employment action solely because the criminal proceedings resulted in no conviction. *Wilson v. Dep't of Homeland Sec.*, 208 Fed. Appx. 876 (C.A. Fed. 2006).

- (c) *Rodriguez-Ortiz v. Dep't of Army*, 46 M.S.P.R. 546 (1991) (A determination by a court that the government had insufficient evidence to prove its criminal case beyond a reasonable doubt will not preclude an agency from attempting to prove the same set of facts by a preponderance of the evidence in a related administrative action).
 - (2) If the conviction is overturned, the MSPB will reverse a removal if it is based *solely* on the conviction. *Payne v. United States Postal Serv.*, 69 M.S.P.R. 503 (1996); *Underwood v. United States Postal Serv.*, 18 M.S.P.R. 708 (1984).
 - (3) The indefinite suspension may continue while the removal action is pending. *Engdahl v. Dep't of Navy*, 900 F.2d 1572 (Fed. Cir. 1990).
- 7. Conditions required for extending indefinite suspension through notice period of a subsequent removal action.
 - a. Resolution of criminal charges;
 - b. Notice to employee when indefinite suspension is proposed, that it may continue pending resolution of any further adverse action deemed appropriate; and
 - c. Action by the agency to initiate further action "within a reasonable period of time after resolution of the criminal charges."
- D. Proper role of proposing and deciding officials. Although unusual, there is no *per se* prohibition on proposing and deciding official being same person. *Hanley v. Gen. Serv. Admin.*, 829 F.2d 23 (Fed. Cir. 1987); *Franco v. Health and Human Servs.*, 32 M.S.P.R. 653 (1987), *aff'd*, 852 F.2d 1292 (Fed. Cir. 1988), *cert. denied*, 489 U.S. 1011 (1989).
 - a. Note: In a performance action under Chapter 43, the proposing and deciding official can be the same person, but a higher-level official must approve the decision. 5 U.S.C. § 4303(b)(1)(D)(ii); *DeSarno v. Dep't of Commerce*, 761 F.2d 657 (Fed. Cir. 1985).
- E. Ex parte communications between deciding official and other agency officials not constitute error *per se*. *Stone v. Fed. Deposit Insurance Corp.*, 179 F.3d 1368 (1999) (No due process violation if ex parte communication did not introduce new and material information to the deciding official); *Blank v. Dep't of Army*, 247 F.3d 1225 (Fed. Cir. 2001); *Freeman v. Dep't of Navy*, 88 M.S.P.R. 659 (2001).
- F. Emergency Furloughs: A furlough due to unforeseen circumstances, e.g., sudden breakdown in equipment, may be taken without an advance notice period. 5 C.F.R. § 752.404(d)(2).

IV. PROOF REQUIREMENTS IN MISCONDUCT ACTIONS.

- A. Proof requirements generally. In every formal disciplinary action for misconduct, the agency must prove by a preponderance of evidence that:
1. The employee committed the misconduct (*King v. Frazier*, 77 F.3d 1361, 1363 (Fed. Cir. 1996));
 2. There is a nexus or connection between the misconduct and the efficiency of the service (*Id.*); and
 3. The penalty was appropriate (reasonable). *Webster v. Dep't of Army*, 911 F.2d 679, 685-86 (Fed. Cir. 1990)).
- B. Proving the employee committed the misconduct.
1. When charging employee misconduct, only charge what you can prove. Draft charges with great care. "It is not permissible for the MSPB to split a single charge of an agency into several independent charges and then sustain one of the newly-formulated charges, which represents only a portion of the original charge. If the agency fails to prove one of the elements of its charge, then the entire charge must fail." *LaChance v. Merit Systems Protection Bd.*, 147 F.3d 1367 (Fed. Cir. 1998); *King v. Nazelrod*, 43 F.3d 663 (1994); *Burroughs v. Dep't of Army*, 918 F.2d 170 (Fed. Cir. 1990).
 2. Independent evidence of act of misconduct.
 - a. An agency must prove all elements of offense charged by a preponderance of the evidence. 5 U.S.C. § 7701(c)(1)(B)); *Jacobs v. Dep't of Justice*, 35 F.3d 1543 (Fed. Cir. 1994); *Perez v. Railroad Retirement Bd.*, 65 M.S.P.R. 287 (1994); *Nazelrod v. Dep't of Justice*, 50 M.S.P.R. 456 (1991).
 - b. A charge citing a violation of a specific criminal statute must be proven by the elements of that law. *Heath v. Dep't of Transportation*, 64 M.S.P.R. 638 (1994); *Larry v. Dep't of Justice*, 76 M.S.P.R. 348, 355 (1997) (Explaining distinction between a charge based upon criminal proceedings and a charge based on underlying misconduct).
 - c. In proving *insubordination*, an agency must prove intent - a willful and intentional refusal to obey a direct order of a superior officer that the officer is entitled to give and have obeyed. With a charge of *failure to follow supervisory instructions*, the agency need only prove that the instructions were given and that the employee failed to follow them, without regard to whether the failure was intentional or unintentional. *Hamilton v. United States Postal Serv.*, 71 M.S.P.R. 547 (1996) (The Board modified its prior case

law in holding insubordination and failure to follow supervisory instructions are separate charges with different standards of proof); *Bryant v. Dep't of Army*, 84 M.S.P.R. 202 (1999).

- d. An agency may charge an employee with both a substantive offense and with false statements (denials) concerning that offense. *LaChance v. Erickson*, 522 U.S. 262 (1998); *Hylick v. Dep't of Air Force*, 85 M.S.P.R. 145, 151 (2000).

3. Evidence of conviction--Collateral Estoppel.

- a. *Graybill v. United States Postal Serv.*, 782 F.2d 1567 (Fed. Cir. 1986); see also *Chisolm v. DLA*, 656 F.2d 42 (3d Cir. 1981) (The MSPB was entitled to use the criminal conviction to collaterally estop employee from denying he committed those acts which led to his removal; however, proceeding was remanded for determination of whether precise issue on which Board sought to estop employee was in fact litigated and necessarily decided adversely to him in the criminal prosecution); see *Fisher v. Dep't of Defense*, 64 M.S.P.R. 509 (1994) (collateral estoppel in general).

- b. The MSPB will carefully examine the basis of a criminal conviction and compare it with the charges leading to the adverse action. See *Owens v. United States Postal Serv.*, 57 M.S.P.R. 63 (1993) (Employee charged by agency with concealing, opening, and possessing mail but criminal conviction did not include the opening of the mail; thus, administrative judge erred in applying collateral estoppel arising from employee's prior criminal conviction for unauthorized possession of mail to preclude litigation on whether employee opened mail).

- c. Alford "nolo contendere" pleas. *Loveland v. Dep't of Air Force*, 34 M.S.P.R. 484 (1987) (Appellant before the Board may be collaterally estopped from denying that he is guilty of crimes for which he was convicted pursuant to an Alford plea); *Fitzgerald v. Dep't of Army*, 61 M.S.P.R. 426 (1994) (Proof that the appellant pled nolo contendere was insufficient; agency was required to prove that the appellant pled guilty because its charge in the removal action was based upon the fact of the pleas, rather than the effect of the pleas or the underlying misconduct).

4. Evidence of indictment, arrest, or deferred prosecution insufficient to prove underlying misconduct, but it may justify an *indefinite suspension*. *O'Connor v. Dep't of Veterans Affairs*, 59 M.S.P.R. 653 (1993); *Roby v. Dep't of Justice*, 59 M.S.P.R. 426 (1993); *Crespo v. U.S. Postal Serv.*, 53 M.S.P.R. 125 (1992).

C. Proving the nexus between the misconduct and the efficiency of the service.

1. An agency may only take an adverse action against an employee for such cause as will promote the efficiency of the service. 5 U.S.C. § 7513(a). The nexus limitation imposed by 5 U.S.C. § 7513(a), requires an agency to show by preponderant evidence "the necessary connection between the employee's off duty misconduct and the employee's job-related responsibilities." *White v. United States Postal Serv.*, 768 F.2d 334, 335-36 (Fed.Cir.1985).
2. Three methods by which the agency may meet its burden of establishing a nexus linking an employee's off-duty misconduct with the efficiency of the service: (1) A rebuttable presumption of nexus may arise in certain egregious circumstances; (2) the agency may show, by a preponderance of the evidence, that the misconduct at issue has adversely affected the employee's or co-workers' job performance or the agency's trust and confidence in the employee's job performance; and (3) the agency may show, by a preponderance of the evidence, that the misconduct interfered with or adversely affected the agency's mission. *Beasley v. Dep't of Defense*, 52 M.S.P.R. 272, 274 (1992); *Johnson v. Dep't of Health and Human Services*, 86 M.S.P.R. 501, 509 (2000).
 - a. Rebuttable presumption of nexus arising in certain "egregious circumstances" based on the nature and gravity of the misconduct. *Graybill v. United States Postal Serv.*, 782 F.2d 1567, 1574 (Fed. Cir. 1986); *Hayes v. Dep't of Navy*, 727 F.2d 1535, 1539 (Fed. Cir. 1984); *Graham v. United States Postal Serv.*, 49 M.S.P.R. 364 (1991) (Off-duty sexual abuse of minor raised rebuttable presumption of nexus).
 - (1) Application of presumption. *Johnson v. HHS*, 22 M.S.P.R. 521 (1984); *Williams v. General Serv. Admin.*, 22 M.S.P.R. 476 (1984).
 - (2) On-duty misconduct. Serious on-duty misconduct raises presumption of nexus. *Dalton v. Dep't of Justice*, 66 M.S.P.R. 429 (1995) (Corrections officer having sexual contact with inmates); *McClaskey v. Dep't of Energy*, 720 F.2d 583 (9th Cir. 1983) (Employee participated in plan to prevent government investigators from discovering his friends' theft of wire valued at \$418 from the government facility where they worked).
 - (3) Employee rebuttal of presumption. *Abrams v. Dep't of Navy*, 714 F.2d 1219 (3d Cir. 1983) (In order to rebut the presumption of nexus, it was not sufficient for employee (who committed violent crime during off-duty hours) to introduce evidence that his conviction did not adversely affect his ability to perform his job, but rather he also had

to show that his conviction did not affect the ability of his fellow employees to perform their work); *Johnson v. Dep't of Health and Human Services*, 86 M.S.P.R. 501 (2000).

- b. The misconduct adversely affects the employee's or co-workers' job performance or the agency's trust and confidence in the employee's job performance.
- (1) Minor on-the-job misconduct satisfying nexus requirement. *Coleman v. U.S. Postal Serv.*, 57 M.S.P.R. 537 (1993) (drinking on job and AWOL). *Sternberg v. Dep't of Defense*, 52 M.S.P.R. 547 (1992) (failure to comply with orders and unauthorized use of government property).
 - (2) Off-duty misconduct off agency premises.
 - (a) Morale problems in office caused by employee's conduct (other employees are uncomfortable working with/around the employee). *Beasley v. Dep't of Defense*, 52 M.S.P.R. 272 (1992) (Conviction for aggravated assault raised concerns for the people who worked in the department); *Sherman v. Alexander*, 684 F.2d 464 (7th Cir. 1982), *cert. denied*, 459 U.S. 1116 (1983) (Atmosphere of fear and mistrust was disruptive of office morale).
 - (b) Impairment of office operation (Other employees have to pick up workload for problem employee). *Id.* at 469.
 - (c) Co-workers' apprehension about employee. *Walsh v. U.S. Postal Serv.*, 53 M.S.P.R. 478 (1992) (Misappropriation of postal funds); *Backus v. OPM*, 22 M.S.P.R. 457 (1984) (Employee shot fiancée while off-duty).
 - (d) Supervisor's lack of confidence in employee. *Dunnington v. Dep't of Justice*, 956 F.2d 1151, 1158 (Fed. Cir. 1992); *Jaworski v. Dep't of Army*, 22 M.S.P.R. 499 (1984); *Honeycutt v. Dep't of Labor*, 22 M.S.P.R. 491 (1984).
 - (e) Misconduct created distrust by supervisors. *Brown v. Dep't. of Navy*, 229 F.3d 1356, 1359-61 (Fed. Cir. 2000) (MWR employee engaged in affair with wife of a deployed Marine, a member of the unit employee was supposed to serve).
 - (i) Fiduciary duties and “shoplifting.”

Stuhlmacher v. U.S. Postal Serv., 89 M.S.P.R. 272 (2001) (Agency proved nexus when employee, who held a high-level management position with fiduciary responsibilities, switched price tags on merchandise while shopping; employee compromised the agency's trust in her ability to function in the supervisory position).

- c. The misconduct interfered with or adversely affected the agency's mission.
- (1) Off-duty misconduct on agency premises. Incident on agency premises and involving use of agency personnel to deal with employee's conduct. *Ingram v. Dep't of Air Force*, 53 M.S.P.R. 101, *aff'd*, 980 F.2d 742 (1992) (buying marijuana from co-worker on base); *Franks v. Dep't of Air Force*, 22 M.S.P.R. 502 (1984) (Employee was removed on charges of being drunk or impaired by intoxicants on government premises); *Venson v. Dep't of Air Force*, 10 M.S.P.R. 375 (1982), *aff'd*, 706 F.2d 319 (Fed.Cir. 1983).
 - (2) Notoriety/adverse publicity surrounding the incident is likely to provoke public indignation and reflect adversely on the agency. *Sherman v. Alexander*, 684 F.2d 464 (7th Cir. 1982), *cert. denied*, 459 U.S. 1116 (1983) (Counselor's sexual indecency with a teenage female and associated publicity); *White v. Postal Serv.*, 768 F.2d 334, 336 (Fed.Cir.1985) (Extensive publicity surrounding misconduct of federal employee can have severe repercussions on the mission of the agency); *see also Wild v. Housing & Urban Dev.*, 692 F.2d 1129, 1133 (7th Cir. 1982) (Discharge of HUD appraiser moonlighting as slum lord following extensive publicity); *Graham v. U.S. Postal Serv.*, 49 M.S.P.R. 364 (1991) (Publicity could adversely affect the agency's reputation and dealings with the public when appellant was convicted of sexual abuse of 14-year old girl and several newspaper articles identified the appellant as a Postal employee).
 - (3) Misconduct antithetical to agency's mission. *Royster v. Dep't of Justice*, 58 M.S.P.R. 495 (1993) (threatening and abusive conduct toward females while off-duty when employee was correctional officer in female prison); *Scofield v. Dep't of Treasury*, 53 M.S.P.R. 179 (1992); *Thompson v. Dep't of Justice*, 51 M.S.P.R. 43 (1991).
 - (4) Employee's absence during incarceration. *Huettner v. Dep't of Army*, 54 M.S.P.R. 472 (1992), *aff'd*, 996 F.2d 318

(Fed.Cir.1993); *Abrams v. Dep't of Navy*, 22 M.S.P.R. 480, 487 (1984).

- D. Demonstrating penalty choice is appropriate (reasonable).
1. General MSPB Rule. *Douglas v. Veterans Admin.*, 5 M.S.P.R. 280 (1981). Relevant considerations for proposing and deciding officials may include:
 - a. Nature and seriousness of offense;
 - b. Employee's job level and type of employment (supervisor, public contact, prominence);
 - c. Employee's past disciplinary record;
 - d. Employee's past work record (length of service, job performance, dependability);
 - e. Effect of offense on employee's ability to perform job and effect upon supervisor's confidence in employee;
 - f. Consistency with penalties to other employees for similar offenses;
 - g. Consistency with agency's table of penalties (see Army's Table of Penalties);
 - h. Notoriety of the offense or its impact on the agency's reputation;
 - i. Clarity of notice to employee that conduct not acceptable;
 - j. Potential for employee's rehabilitation;
 - k. Mitigating circumstances (unusual job stress, personal problems, provocation); and
 - l. Adequacy of alternative sanctions to deter misconduct by this employee and others.
 2. Agency need not demonstrate that it considered each *Douglas* factor; it need consider only those *Douglas* factors relevant to its decision. *Nagel v. Health and Human Services*, 707 F.2d 1384 (Fed. Cir. 1983); *Lewis v. General Services Admin.*, 82 M.S.P.R. 259, 263 (1999).
 - a. Agency must present evidence demonstrating its consideration of the relevant *Douglas* factors even if employee does not contest the propriety of the penalty choice. *Parsons v. Dep't of Air Force*, 707 F.2d 1406 (D.C. Cir. 1983).

- b. Where an agency policy provides for removal of an employee found to be stealing government property for petty amounts, and even for the first offense, the deciding official must still demonstrate that she considered the relevant *Douglas* factors prior to deciding that removal is the appropriate penalty for the misconduct. *Banez v. Dep't of Defense*, 69 M.S.P.R. 642 (1996) (De minimis nature of theft may be significant mitigating factor when appellant has satisfactory work and disciplinary record).
 - c. Zero Tolerance Policies. Deciding official must still apply *Douglas* factors when deciding the appropriate penalty for violations of agency "zero tolerance" policies. *Brown v. Dep't of Treasury*, 91 M.S.P.R. 60 (2002) (IRS supervisor who accessed subordinate's tax account information without authorization); *Omites v. U.S. Postal Serv.*, 87 M.S.P.R. 223 (2000) (Deciding official failed to weigh the relevant *Douglas* factors in taking the position that removal was the proper penalty for any violation of agency's zero tolerance policy toward violence and threats of violence).
3. Consistency with Table of Penalties. A table of penalties listing specific offenses and penalties for first, second and further offenses is one factor to consider in determining the appropriateness of a penalty. *Davis v. Dep't of Army*, 56 M.S.P.R. 583 (1993); *Padilla v. Dep't of Justice*, 64 M.S.P.R. 416 (1994).
- a. An agency may deviate from the guidelines where a more severe penalty is reasonable. *Chatman v. Dep't of Army*, 73 M.S.P.R. 582 (1997); *Basquez v. Dep't of the Air Force*, 48 M.S.P.R. 215, 218 (1991).
 - b. Agencies' intent to be bound. When agency's table of penalties did not specifically provide for the penalty imposed upon the employee (demotion for conduct unbecoming an officer), the agency was not bound by the table because the agency did not intend for the table to be binding. *Farrell v. Dep't of Interior*, 314 F.3d 584 (Fed. Cir. 2002).
4. *Lewis v. Department of Veterans Affairs*, 113 M.S.P.R. 657 (2010): One of the factors in assessing the reasonableness of a penalty is the consistency of the penalty with those imposed on other employees for the same or similar offenses. To establish disparate penalties, an appellant must show that the charges and circumstances surrounding the charged behavior are substantially similar. Under recent precedent, establishing that the charges and circumstances surrounding the charged behavior are substantially similar has required proof that the proffered comparator was in the same work unit, with the same supervisor, and was subjected to the same standards governing discipline. Consistent with the rationale of the Board's reviewing court in *Williams v. Social Security Administration*,

586 F.3d 1365 (Fed. Cir. 2009).

5. How much deference does the MSPB give agency penalty selection?

a. General Rule.

(1) The Board will give deference to an agency's decision regarding a penalty unless that penalty exceeds the range of allowable punishment specified by statute or regulation, or the penalty is "so harsh and unconscionably disproportionate to the offense that it amounts to an abuse of discretion." *Parker v. U.S. Postal Serv.*, 819 F.2d 1113, 1116 (Fed. Cir. 1987); see *Lachance v. Devall*, 178 F.3d 1246, 1251-52, 1258 (Fed. Cir. 1999).

(2) Choice of maximum penalty not necessarily abuse of discretion. *Stump v. Dep't of Transp.*, 761 F.2d 680 (Fed. Cir. 1985).

b. Deference Granted When All Charges and Specifications Sustained. Where all of the charges are sustained, the Board will modify an agency's chosen penalty only if the agency failed to weigh the relevant factors or if the agency's decision clearly exceeded the limits of reasonableness. *Douglas v. Veterans Admin.*, 5 M.S.P.R. 280, 305-06 (1981), *Coleman v. Dep't of Defense*, 100 M.S.P.R. 574 (2005).

(1) *Woebcke v. Department of Homeland Security*, 114 M.S.P.R. 100 (2010): In affirming the mitigation of the removal penalty to a 14-day suspension, the Board found that the administrative judge properly analyzed the applicable *Douglas* factors in determining that the removal penalty exceeded the bounds of reasonableness, including the judge's determination that the agency treated the appellant disparately compared to other similarly-situated employees. Although the fact that a comparator was supervised by a different individual may sometimes justify different penalties, an agency must explain why differing chains of command would justify different penalties.

c. Deference Granted When All Charges Sustained, But Not All Specifications Sustained.

(1) Where the Board sustains the charge, but not all the specifications of the charge, it will review the agency-imposed penalty to determine whether it is within the parameters of reasonableness. *Dunn v. Dep't of Air Force*, 96 M.S.P.R. 166 (2004); *Payne v. U.S. Postal Serv.*, 72

M.S.P.R. 646, 650-51 (1996).

- (2) The Board has stated, “The Board's function is not to displace management's responsibility or to decide what penalty it would impose, but to assure that management's judgment has been properly exercised and that the penalty selected by the agency does not exceed the maximum limits of reasonableness.” *Dunn v. Dep’t of the Air Force*, 96 M.S.P.R. 166 (2004); *Stuhlmacher v. U.S. Postal Serv.*, 89 M.S.P.R. 272 (2001). *Cameron v. Dep’t of Justice*, 100 M.S.P.R. 477 (2005).
- (3) “The Board will modify a penalty only when it finds that the agency failed to weigh the relevant factors or that it clearly exceeded the bounds of reasonableness in determining the penalty.” *Cameron v. Dep’t of Justice*, 100 M.S.P.R. 477 (2005).

d. Deference Granted When Only Some Charges Sustained.

- (1) “When the Board sustains fewer than all of the agency's charges, the Board may also mitigate the agency's penalty to the maximum reasonable penalty as long as the agency has not indicated in either its final decision or in proceedings before the Board that it desires that a lesser penalty be imposed on fewer charges.” *Cameron v. Dep’t of Justice*, 100 M.S.P.R. 477 (2005); see also *Lachance v. Devall*, 178 F.3d 1246 (Fed.Cir. 1999); *Modrowski v. Dep’t of Veteran Affairs*, 252 F.3d 1344 (Fed. Cir. 2001).
- (2) When the MSPB agrees with the penalty assessment, yet declines to affirm all charges, the Board must “precisely articulate the basis for upholding the agency’s action.” *Blank v. Dep’t of Army*, 247 F.3d 1225 (Fed. Cir. 2001).

e. Zero Deference Granted When Relevant *Douglas* Factors Not Considered. If the deciding official failed to properly consider the relevant factors set forth in *Douglas*, the Board need not defer to the agency's penalty determination. *Stuhlmacher v. U.S. Postal Serv.*, 89 M.S.P.R. 272 (2001).

6. When mitigation is deemed appropriate by the MSPB. Where mitigation is appropriate, the Board will correct the agency's penalty only to the extent necessary to bring it to the maximum penalty or the outermost boundary of the range of reasonable penalties. See e.g., *Jacoby v. U.S. Postal Serv.*, 85 M.S.P.R. 554 (2000); see also *Lachance v. Devall*, 178 F.3d 1246, 1260 (Fed.Cir.1999).
7. Use of previous disciplinary actions to enhance punishment in current action. AR 690-700, Subch. 751; AFI 36-704, para. 37.

- a. General Rule. The agency may use past discipline to enhance the punishment in the current misconduct provided the employee was given adequate due process in the previous action and the prior misconduct is adequately detailed to permit an informed reply. *Bolling v. Dep't. of Air Force*, 9 M.S.P.R. 335 (1981); *Guzman-Muelling v. Social Sec. Admin.*, 91 M.S.P.R. 601, 606 (2002).

- b. Adequate detail of prior misconduct. The record must contain documentary evidence showing that the appellant was informed of the prior actions in writing, that the actions were a matter of record, and that the appellant was permitted to dispute the charges before an authority different from the authority that took the actions against him. *Holland v. Dep't of Defense*, 83 M.S.P.R. 317(1999); *Thomas v. Dep't of Defense*, 66 M.S.P.R. 546 (1995), *aff'd*, 64 F.3d 677 (Fed. Cir. 1995) (Table); *Covington v. Dep't of Army*, 85 M.S.P.R. 612 (2000).
 - (1) If one of these protections is absent, the MSPB undertakes a full *de novo* review of the earlier action as part of its review of the later disciplinary action. *Bolling v. Dep't. of Air Force*, 9 M.S.P.R. 335, 659 (1981).
 - (2) If all three safeguards are present, the MSPB will disregard the prior action for purpose of enhancing the punishment only if the employee can show, based upon the existing record from the earlier proceeding, that the earlier action was clearly erroneous. *Id.* at 660.
 - (3) When employee does not challenge the validity of the prior disciplinary action relied upon in determining penalty, the AJ need only verify the occurrence of that action. *Holland v. Dep't of Defense*, 83 M.S.P.R. 317, 321-22 (1999).

- c. Past discipline time barred. An agency may not rely on disciplinary actions that have expired by their terms or because of an agency regulation. *Gardner v. U.S. Postal Serv.*, 44 M.S.P.R. 565 (1990); *Amell v. General Serv. Admin.*, 7 M.S.P.R. 531 (1981). *Spearman v. U.S. Postal Serv.*, 44 M.S.P.R. 135 (1990) (finding time barred discipline could not be used to support more severe penalty, but could be used to rebut argument of past good performance).
 - (1) Army: In assessing penalties, consideration should be given to the "freshness" of the previous offense in relation to the current infraction. AR 690-700, Ch. 751, para. 1-4(c). Reprimands are made a matter of record and incorporated in the employee's official personnel folder for no more than 3 years. AR 690-700, Ch. 751, para. 3-2(c).

- (2) Air Force: Prior suspensions may be used only if the effective date is within 3 years of the date of the proposed action for the current offense. AFI 36-704, para. 37.1. Oral admonishments and reprimands may be used only if effective date is within 2 years of the date of the proposed action for the current offense. Para. 37.2.
 - d. Dissimilarity in offenses may be relevant to weight accorded prior discipline in determining an appropriate penalty. *Skates v. Dep't of Army*, 69 M.S.P.R. 366 (1996); *Jackson v. Veterans Admin.*, 768 F.2d 1325 (Fed. Cir. 1985). *Lewis v. Dep't of Air Force*, 51 M.S.P.R. 475 (1991).
 - e. A canceled action may still be used as proof that the employee was warned of misconduct. *Rush v. Dep't of Air Force*, 69 M.S.P.R. 416 (1996).
 - f. Nondisciplinary sanctions. An agency may consider nondisciplinary counseling as a basis for an enhanced penalty, but employee must be on notice of their use. *Thomas v. Dep't of Defense*, 66 M.S.P.R. 546 (1995), *aff'd*, 64 F.3d 677 (Fed.Cir. 1995) (Table); *Lovenduski v. Dep't of Army*, 64 M.S.P.R. 612 (1994); *Brown v. Dep't. of Treasury*, 91 M.S.P.R. 60 (2002).
8. Use of pending disciplinary actions to support penalty.
- a. Agency, when disciplining or removing an employee for misconduct, may take into account prior disciplinary actions that are the subject of *pending* grievance proceedings when determining the appropriate penalty in the current disciplinary or removal action. *U.S. Postal Serv. v. Gregory*, 534 U.S. 1 (2001).
 - b. The MSPB may review independently prior disciplinary actions pending in grievance proceedings when reviewing termination and other serious disciplinary actions. Where a termination is based on a series of disciplinary actions, some of which are minor, the MSPB's authority to review the termination must also include the authority to review each of the prior disciplinary actions to establish the penalty's reasonableness. If the MSPB's independent review procedure is adequate, the review that employee receives is fair. Although that procedure's fairness was not before the Court, a presumption of regularity attaches to agency actions, and some deference to agency disciplinary actions is appropriate. *Bartram v. U.S. Postal Serv.*, 93 M.S.P.R. 74 (2002).
- E. Harmful procedural error. The employee (appellant) has the burden of proving by preponderance that the agency committed a "harmful procedural error" in arriving at its decision. This is error that is likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence of the error. 5 U.S.C. § 7701(c)(2); 5 C.F.R. § 1201.56; *Scott v. Dep't of Justice*, 69 M.S.P.R. 211, 242 (1995), *aff'd*, 99 F.3d 1160 (Fed.Cir. 1996).

V. SPECIAL DISCIPLINARY SITUATIONS.

- A. Adverse action based on revocation of security clearance. *Dep't of Navy v. Egan*, 108 S. Ct. 818 (1988); *Drumheller v. Dep't of Army*, 49 F.3d 1566 (Fed. Cir. 1995) (finding courts have no authority to review the merits of an agency security clearance decision); *Brockmann v. Dep't of Air Force*, 27 F.3d 544 (Fed. Cir. 1994) (the MSPB and courts may have jurisdiction over security clearance determinations that involve colorable constitutional claims); *Hesse v. Dep't of State*, 217 F.3d 1372, 1375-80 (Fed. Cir. 2000) (Board lacks jurisdiction to review employee's claim his security clearance was suspended in retaliation for whistleblowing). The MSPB may review only the procedural steps of removal in security clearance cases; neither the MSPB nor the courts can review the merits of an executive agency's denial or revocation of a security clearance of a civilian employee.
1. The Supreme Court held in *Egan* that, in an appeal under 5 USC § 7513, based on the denial or revocation of a security clearance, the MSPB does not have authority to review the substance of the underlying security clearance determination. The Court ruled that the grant of a security clearance to a particular employee is a sensitive matter and that the denial of access to classified information and areas is entrusted to the sole discretion of the agency. *Dep't of Navy v. Egan*, 108 S. Ct. 818, 824 (1988).
 2. MSPB review is limited to determining that--
 - a. Agency has established requirement of security clearance for position in question;
 - b. Employee has lost or been denied a security clearance; and
 - c. Agency has provided minimal due process protections to employee: notice of denial or revocation, statement of reasons upon which negative determination was based, and opportunity to respond.
 3. An employee who loses his security clearance has no substantive right to consideration for alternative employment in nonsensitive positions, unless such right is provided by agency regulation. *Griffin v. Defense Mapping Agency*, 864 F.2d 1579 (Fed. Cir. 1989); *Hesse v. Dep't of State*, 217 F.3d 1372, 1381 (Fed. Cir. 2000).
 4. Employee cannot challenge agency's requirement of security clearance for position in question. *Skees v. Dep't of Navy*, 864 F.2d 1576 (Fed. Cir. 1989).
 5. Egan defense does not apply by analogy to loss of certifications other than security clearances. *Jacobs v. Dep't of Army*, 62 M.S.P.R. 688

(1994) (finding Egan inapplicable to revocation of chemical munitions access. The appellant held a certification necessary for employees who worked with or around chemical agents and weapons. The appellant, a GS-7 Security Guard, lost his certification and as a result, his job, when he allegedly “verbally assaulted” another officer. The Board held that the certification was not the equivalent of a security clearance and that the Board could review the agency action.); See, e.g., *McGillivray v. Fed. Emergency Management Agency*, 58 M.S.P.R. 398 (1993) (revocation of procurement authority); *Siegert v. Dep’t of Army*, 38 M.S.P.R. 684 (1988) (revocation of psychologist’s clinical privileges).

B. Involuntary resignation/retirement.

1. A decision to resign or retire is presumed to be voluntary. *Christie v. United States*, 518 F.2d 584, 587 (Ct. Cl. 1975); *Staats v. United States Postal Serv.*, 99 F.3d 1120, 1123 (Fed. Cir. 1996).
2. An employee who voluntarily resigns or retires has no right to appeal to the MSPB. *Staats*, 99 F.3d at 1123–24.
3. The MSPB possesses jurisdiction over an appeal filed by an employee who has resigned or retired if the employee proves, by a preponderance of the evidence, that his or her resignation or retirement was involuntary and thus tantamount to forced removal. *Id.* at 1124; *Braun v. Dep’t of Veterans Affairs*, 50 F.3d 1005, 1008 (Fed. Cir. 1995).
4. An involuntary resignation constitutes a constructive removal that is appealable to the MSPB. *Mintzmyer v. Dep’t of the Interior*, 84 F.3d 419, 423 (Fed. Cir. 1996).
5. An employee is entitled to a jurisdictional hearing to establish whether his disability retirement was involuntary (appealed as a constructive removal). *Atkins v. Dep’t of Commerce*, 81 M.S.P.R. 246 (1999).

C. Involuntary Downgrading. Although an employee’s acceptance of a lower– graded position, like a resignation, is generally considered voluntary and not subject to the jurisdiction of the Board, the coerced acceptance of the position is appealable. The MSPB looks to involuntary acceptance of the employer’s terms, conditions permitting no alternative, and action resulting from coercive acts. *Cohn v. Dep’t of Transp.*, 5 M.S.P.R. 365, 369 (1981) (the agency’s offer was communicated through OSC; the appellant was advised by a union representative and had a consultation with counsel; the appellant had ten days to consider the offer; no pressure was exerted by the agency to accept the agreement); see *Morrow v. Dep’t of Army*, 4 M.S.P.R. 443, 446–47 (1980) (overruled in part by *Marchese v. Dep’t of Navy*, 32 M.S.P.R. 461) (a demotion was coerced where the appellant was forced either to accept a steep demotion or to apply for disability retirement, coupled with an agency directive that she take enforced sick leave; an agency may not take advantage of an employee’s known weakness, illness, or problem to press an undue advantage).

1. Withdrawal of downgrade request. An involuntary downgrading may also occur when the agency improperly refuses to permit the employee to withdraw a requested downgrade prior to its effective date. When that situation arises, the employee prevails because the agency violates the employee's right to the minimum due process required in an adverse action. *See Rivas v. U.S. Postal Serv.*, 57 M.S.P.R. 489, 493–94 (1993); *cf. Ricci v. Veterans Admin.*, 40 M.S.P.R. 113, 116 (1989) (applying an involuntariness analysis to challenges to changes from full–time to part– time employment).
2. Unpleasant alternatives. Under *Lee v. Office of Personnel Mgmt.*, 23 M.S.P.R. 403, 406 (1984), a choice between unpleasant alternatives does not render the downgrading involuntary. In *Lee*, the appellant need not have taken a downgrade as he could have allowed himself to be removed for unsatisfactory performance and challenged the action, or he could have applied for leave without pay.
3. Constructive Demotions. The jurisdictional issue in an involuntary demotion case is not whether the demotion was voluntary, but whether the employee presents nonfrivolous allegations of involuntariness. *See Ragland v. Internal Revenue Serv.*, 1 M.S.P.R. 758, 759 (1980) (“When an employee presents a nonfrivolous argument that his acceptance of a reassignment to a lower grade was coerced, and this argument is based on more than mere conclusory allegations, the employee is entitled to a hearing on the allegation.”). *Dvorin v. Dep’t of Air Force*, 70 M.S.P.R. 407, 410–11 (1996).

D. Involuntary Transfers.

1. Although its reasoning relative to the statutory definitions of appealable actions was not clear, the Board held that an involuntary transfer between agencies may be considered tantamount to removal and appealable to the Board under *Colburn v. Dep’t of Justice*, 80 M.S.P.R. 257, 259–60 (1998).
2. In *Yaksich v. Dep’t of Air Force*, 71 M.S.P.R. 355 (1996), the Board found that an employee–initiated action, such as a transfer between agencies, is presumed to be voluntary unless the appellant presents sufficient evidence to establish that the action was obtained through duress or coercion, or was otherwise involuntary, and that an appellant is entitled to a hearing on the issue of Board jurisdiction over an appeal of an allegedly involuntary action if she makes a nonfrivolous allegation casting doubt on the presumption of voluntariness. Although *Yaksich* does not specifically state the relationship between the grades of the position the appellant left at her former agency and the position into which she transferred at the new agency, its holding is not limited to transfers to lower–graded positions, and instead finds that “a transfer between agencies” can be appealable if it is involuntary. *Id.*

- E. No Right To Lie. In *LaChance v. Erickson*, 522 U.S. 262 (1998), the Court held that an agency may take adverse action against an employee because the employee made false statements in response to an underlying charge of misconduct. If

answering an agency's investigatory question could expose an employee to a criminal prosecution, he may exercise his Fifth Amendment right to remain silent. It may well be that an agency, in ascertaining the truth or falsity of the charge, would take into consideration the failure of the employee to respond. See *Baxter v. Palmigiano*, 425 U.S. 308, 318, (1976) (discussing the "prevailing rule that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify").

- F. Uniformed Services Employment and Reemployment Rights Act (USERRA).
 - 1. USERRA requires employers to place employees returning from military leave into the position they would have held if they had been continuously employed. Pursuant to 38 U.S.C. § 4324(b), a person who claims that a Federal executive agency has failed to comply with the USERRA may submit a complaint directly to the MSPB if at least one of several listed conditions is met. The Board then is required to adjudicate the complaint. 38 U.S.C. § 4324(c)(1). Under § 4324, an adverse determination of the Board in connection with a USERRA complaint may be the subject of a petition for review to the United States Court of Appeals for the Federal Circuit in accordance with the procedures set forth in 5 U.S.C.S. § 7703.
 - 2. In challenging an adverse action before the Board, an employee of a federal executive agency may assert, as an affirmative defense, a violation of USERRA by the agency. *Yates v. Merit Systems Protection Bd.*, 145 F.3d 1480 (1998).
- G. Burden of Proof in USERRA cases.
 - 1. Given the liberal construction afforded to USERRA ... in cases in which the appellant either explicitly or implicitly raises USERRA as an affirmative defense, the AJ must inform the appellant of the burden of proof, the burden of going forward with the evidence, and the type of evidence necessary to prove the affirmative defense. *Fox v. U.S. Postal Serv.*, 88 M.S.P.R. 381 (2001)
 - 2. *Sheehan v. Dep't of Navy*, 240 F.3d 1009 (Fed. Cir. 2001) (Employee's military status was a substantial or motivating factor in the adverse employment action ("but-for" test)).

VI. AVENUES EMPLOYEE MAY PURSUE OTHER THAN MSPB.

- A. Equal Employment Opportunity complaint ("mixed case complaint").
 - 1. A mixed case occurs when an employee contests an action appealable to the MSPB and claims the action was taken as the result of discrimination based on race, color, religion, sex, national origin, age or disability. The employee can elect to contest the case either through the MSPB or the Equal Employment Opportunity Commission (EEOC). Significant provisions covering mixed cases are found at 29 C.F.R. § 1614.302, 5

C.F.R. § 1201.151, and 5 U.S.C. § 7702.

2. A mixed case that is filed with the EEOC is known as a mixed complaint. 29 C.F.R. § 1614.302.
 3. A mixed case that is filed with the MSPB is known as a mixed appeal. 5 C.F.R. § 1201.157.
- B. Office of Special Counsel (whistleblower retaliation; prohibited personnel practice).
1. The Whistleblower Protection Act prohibits agencies from retaliating against employees and applicants because they disclosed information that they believed evidenced violation of law, rule or regulation; gross mismanagement; gross waste of funds; abuse of authority; or substantial and specific danger to public health or safety.
 2. Whistleblower reprisal refers to the actual or threatened taking or withholding of a personnel decision in retaliation for a protected disclosure of fraud, waste or abuse under 5 U.S.C. § 2302(b)(8).
 3. The Office of Special Counsel or an employing agency can initiate a charge of reprisal for whistleblower activity. The agency can bring the charge as a prohibited personnel practice under 5 U.S.C. § 2302 or as a violation of agency standards of conduct.
 4. A claim of whistleblower reprisal is also an affirmative defense to an adverse agency action.
- C. Grievance. May be pursued in accordance with a collective bargaining agreement or pursuant to agency administrative grievance procedure.

VII. CONCLUSION.

CHAPTER D

LAW OF FEDERAL EMPLOYMENT

Merit Systems Protection Board (MSPB) Practice and Procedures

I. INTRODUCTION.....	3
II. REFERENCES	3
III. JURISDICTION.....	4
A. GENERAL	4
B. ORIGINAL JURISDICTION.....	4
C. APPELLATE JURISDICTION	4
D. AGENCY CHALLENGES TO JURISDICTION.....	5
IV. PROCESSING AN APPELLATE CASE.....	10
A. AGENCY DECISION NOTICE.....	10
B. EMPLOYEE APPEAL	11
C. ACKNOWLEDGMENT ORDER.....	12
D. AGENCY RESPONSE.....	12
E. MOTION PRACTICE	13
F. DISCOVERY	13
G. PREHEARING SUBMISSIONS AND PREHEARING CONFERENCE(S).....	16
H. HEARING.....	16
I. RECORD	18
J. INITIAL DECISION BY ADMINISTRATIVE JUDGE.....	19
K. PETITION FOR REVIEW (PFR).....	20
L. MSPB REVIEW OF INITIAL DECISION.....	21
M. INTERVENTION BEFORE THE BOARD.....	21
N. OPM PETITION FOR RECONSIDERATION	22
O. JUDICIAL REVIEW.....	22

V. PROCESSING A MIXED CASE	17
A. ELECTION OF REMEDIES	17
B. TIME FOR FILING APPEAL	17
C. TIME FOR PROCESSING APPEAL	17
D. REVIEW OF MSPB DECISION BY EEOC	17
E. MSPB ACTION ON EEOC DECISION	17
F. REFERRAL TO SPECIAL PANEL.....	17
G. JUDICIAL REVIEW.....	18
VI. SETTLEMENT.....	18
A. POLICY.....	18
B. ROLE OF THE ADMINISTRATIVE JUDGE	18
C. INCLUDING SETTLEMENT AGREEMENT IN RECORD.....	18
D. CONTENT OF AGREEMENT.....	18
E. SETTING ASIDE A SETTLEMENT AGREEMENT	19
VII. RELIEF.....	19
A. MSPB AUTHORITY.....	19
B. TRADITIONAL REMEDIES -- STATUS QUO ANTE	19
C. STAY OF PERSONNEL ACTION	19
D. INTERIM RELIEF	19
E. ATTORNEY FEES	19
VIII. COMPLIANCE AND ENFORCEMENT.....	21
A. STATUTORY AUTHORITY	21
B. PETITION FOR ENFORCEMENT.....	21
IX. CONCLUSION.....	21

MSPB Practice and Procedures

I. INTRODUCTION.

II. REFERENCES.

A. Primary.

1. 5 United States Code §§ 7701-7703.
2. 5 Code of Federal Regulation Part 772 (Interim Relief).
3. 5 Code of Federal Regulation Part 1201 (Practices and Procedures).
4. 5 Code of Federal Regulation Part 1209 (Practices and Procedures for Appeals and Stay Requests of Personnel Actions Allegedly Based on Whistleblowing).
5. <http://www.mspb.gov>

B. Secondary.

1. Winning at the Merit Systems Protection Board: A Step-By-Step Handbook for Federal Agency Supervisors, Managers, Lawyers, and Personnel Officials (2002). www.deweypub.com.
2. A Guide to Merit Systems Protection Board Law and Practice. Peter Broida, Dewey Publications, Inc., www.deweypub.com. Updated Annually.
3. U.S. Merit Systems Protection Board Reporter (M.S.P.R.), West Publishing Company. The official reporter for MSPB decisions.

III. JURISDICTION.

A. General. 5 U.S.C. § 1204(a).

B. Original Jurisdiction. 5 C.F.R. § 1201.2.

1. Actions brought by the Special Counsel.
2. Certain actions against Senior Executive Service employees.
3. Actions against administrative law judges.

C. Appellate Jurisdiction. 5 U.S.C. §§ 7701 - 7703; 5 C.F.R. § 1201.3.

1. Statutory.

- a. Removal or reduction in grade for unacceptable performance. 5

U.S.C. § 4303(e).

- b. Removal, reduction in grade or pay, suspension for more than 14 days, or furlough for 30 days or less for cause that will promote the efficiency of the service. 5 U.S.C. § 7512.
- c. Mixed cases. 5 U.S.C. § 7702.
- d. Individual right of action (IRA) appeals. 5 U.S.C. § 1221(a). A personnel action that the appellant alleges was threatened, proposed, taken, or not taken because of the appellant's whistleblowing activities. *Harding v. Dep't Veterans Affairs*, 448 F.3d 1373 (Fed. Cir. 2006).

2. Regulatory.

- a. Termination of competitive service probationer. 5 C.F.R. § 315.806. A very limited right of appeal. MSPB has jurisdiction only if the probationer makes a non-frivolous allegation that removal was based on:
 - (1) Discrimination because of marital status. *Edem v. Dep't of Commerce*, 64 M.S.P.R. 501 (1994); *Bedynek-Stumm v. Dep't of Agric.*, 57 M.S.P.R. 176 (1993); *Gribben v. Dep't of Justice*, 55 M.S.P.R. 257 (1992); or
 - (2) Partisan political affiliation. *Munson v. Dep't of Justice*, 55 M.S.P.R. 246 (1992); *James v. Dep't of Army*, 55 M.S.P.R. 124 (1992).
- b. Assignment of probationary managers and supervisors to nonmanagerial or nonsupervisory positions. 5 C.F.R. § 315.908(b). This is also a very limited appeal right. MSPB has jurisdiction only if the probationary supervisor demonstrates the reason for returning the employee to nonsupervisory status was discrimination based on marital status or partisan political affiliation.
- c. Reductions in force. 5 C.F.R. § 351.901. Employee appeal rights when reemployment priority rights violated, 5 C.F.R. § 330.209. *Sturdy v. Dep't of Army*, 440 F.3d 1328 (Fed. Cir. 2006).
- d. Denials of reconsideration of withholding within-grade ("step") increases. 5 C.F.R. § 531.410.
- e. Denial of restoration rights (military duty and recovery from compensable injury). 5 C.F.R. § 353.401.

D. Agency Challenges to Jurisdiction.

1. Action challenged is not an appealable action.
 - a. Placing employee in AWOL status. *Perez v. Merit Sys. Protection Bd.*, 931 F.2d 853 (Fed. Cir. 1991); *Rose v. Heath & Human Serv.*, 721 F.2d 355 (Fed. Cir. 1983).
 - b. Voluntary resignation or retirement. *Cruz v. Dep't of Navy*, 934 F.2d 1240 (Fed. Cir. 1991) (presumption of voluntariness in retirement or resignation); *Schultz v. Dep't of Navy*, 810 F.2d 1133 (Fed. Cir.1987); *Burgess v. Merit Sys. Protection Bd.*, 758 F.2d 641 (Fed. Cir. 1985); *Caveney v. Office of Admin.*, 57 M.S.P.R. 667 (1993). But see 5 U.S.C. §§ 1221(j) and 7701(j); 5 C.F.R. § 1201.3(d); *Mays v. Dep't of Trans.*, 27 F.3d 1577 (Fed. Cir.1994). Disability retirement issues, *See Nordhoff v. Dep't of Navy*, 78 MSPR 88 (1998); *Handy v. Dep't of Army*, 82 M.S.P.R. 683 (1999).
 - c. Classification. *Pavlopoulos v. Office of Personnel Management*, 58 M.S.P.R. 620 (1993); *Atwell v. Dep't of Army*, 2 M.S.P.R. 484 (1980), *aff'd*, 670 F.2d 272 (D.C. Cir. 1981).
 - d. Failure to promote. *Williams v. Dep't of Army*, 651 F.2d 243 (4th Cir. 1981); *Kochanoff v. Dep't of Treasury*, 54 M.S.P.R. 517 (1992).
 - e. Reassignments without loss of grade or pay. *Wilson v. Merit Sys. Protection Bd.*, 807 F.2d 1577 (Fed. Cir. 1986); *Maddox v. Merit Sys. Protection Bd.*, 759 F.2d 9 (Fed. Cir. 1985); *Von Kelsch v. Dep't of Labor*, 51 M.S.P.R. 378 (1991); *Else v. Dep't of Justice*, 3 M.S.P.R. 397 (1980).
 - f. Valid settlement agreement. *Smitherman v. Defense Logistics Agency*, 56 M.S.P.R. 626 (1993).
 - g. Whistleblower exception. *Kochanoff v. Dep't of Treasury*, 54 M.S.P.R. 517 (1992).
- (1) Unless the action challenged is otherwise appealable to the MSPB, the employee must first seek corrective action from the Special Counsel and exhaust those proceedings before bringing an individual right of action. *Ferry v. Hayden*, 954 F.2d 658 (11th Cir. 1992); *Knollenberg v. Merit Sys. Protection Bd.*, 953 F.2d 623 (Fed. Cir. 1992); *Lozada v. Equal Employment Opportunity Comm'n*, 45 M.S.P.R. 310 (1990).

- (2) The Board has, in limited circumstances, jurisdiction over all personnel actions allegedly based on appellant's whistleblowing under an individual right of action (IRA).
 - (a) Personnel actions are defined in 5 U.S.C. § 2302(a)(2) and include: appointment, promotion, adverse action under Chapter 75, other disciplinary or corrective action, detail, transfer, reassignment, performance evaluation, a decision to order psychiatric testing or examination, or any other significant change in duties, responsibilities, or working conditions.
 - (b) Is reduction in force one of the personnel actions defined in 5 U.S.C. § 2302(a)(2)? *Carter v. Dep't of Army*, 62 M.S.P.R. 393 (1994), reversing 56 M.S.P.R. 321 (1993).
 - h. The Board has held that a jurisdictional determination (i.e., was the resignation or retirement voluntary) is not required when the Board, by assuming *arguendo* it has jurisdiction, finds that the appeal can be properly dismissed on timeliness or other grounds. *Gaydon v. U.S. Postal Serv.*, 62 M.S.P.R. 198 (1994); *Popham v. U.S. Postal Serv.*, 50 M.S.P.R. 193 (1991).
2. Employee challenging action does not have appeal rights.
- a. Probationary or term employee.
 - (1) Limited appeal rights. *Edmond v. Dep't of Air Force*, 57 M.S.P.R. 361 (1993); *Gribben v. Dep't of Justice*, 55 M.S.P.R. 257 (1992).
 - (2) Demonstrating limited basis for appeal. *McChesney v. Dep't of Justice*, 55 M.S.P.R. 512 (1992); *Gribben v. Dep't of Justice*, 55 M.S.P.R. 257 (1992).
 - (3) Is employee a probationer? Question concerning appointment *Toyens v. Dep't of Justice*, 58 M.S.P.R. 634 (1993); *Stanley v. Dep't of Justice*, 58 M.S.P.R. 354 (1993). Determine when a probationary period required. 5 CFR § 315.801.
 - (a) When employee is given a career or career-conditional appointment and
 - (i) Was appointed from competitive list of eligibles;

- (ii) Was reinstated, unless employee completed probationary period or served with competitive status under an appointment which did not require probationary period; or
 - (iii) Was transferred, promoted, demoted, or reassigned before completing the probationary period.
- (b) Employees reinstated from Reemployment Priority List to position in same agency and same commuting area do not have to serve new probationary period, unless probationary period was not completed in last job. 5 CFR § 315.801.
- (c) Prior federal civil service (including nonappropriated fund service) *may* count toward completion of probation (see factors at 5 CFR § 315.802(b)).
- (d) Requirement of new probationary period upon change in positions if new appointment or initial probationary period not satisfied. 5 C.F.R. § 315.801(b); *Park v. DHHS*, 78 M.S.P.R. 527 (1998); *Grigsby v. Dep't of Commerce*, 729 F.2d 772 (Fed. Cir. 1984); *Francis v. Dep't of Navy*, 53 M.S.P.R. 545 (1992). See also, *McCormick v. Dep't of Air Force*, 307 F.3d 1339 (Fed. Cir. 2002), pet. for reh'g en banc denied, 329 F.3d 1354 (Fed. Cir. 2003), 98 M.S.P.R. 201 (2005), on remand (MSPB had jurisdiction over fired Air Force employee's petition for review, although employee was serving one-year probationary period when she was fired, where she had completed one year of continuous competitive service as a career conditional employee of federal agency before she voluntarily requested change of appointment and was transferred to the Air Force). 5 U.S.C. § 7511(a)(1)(A)(i, ii).
- b. Excepted service employee. Only preference eligible with more than one year of service and (after August 17, 1990) most non-preference eligible with two or more years of current continuous service (nonprobationary equivalent) have appeal rights. *Pennington v. Dep't of Veterans Affairs*, 57 M.S.P.R. 8 (1993); *Coradeschi v. DHS*, 439 F.3d 1329 (Fed. Cir. 2006).

- c. Nonappropriated fund employee. *Perez v. AAFES*, 680 F.2d 779 (D.C. Cir. 1982).
 - d. National Guard technician. In 1991, the Board held that National Guard technicians are "employees" who have MSPB appeal rights only for matters outside the sole authority of the state adjutant general. *Ockerhausen v. New Jersey Dep't of Military and Veterans Affairs*, 52 M.S.P.R. 484 (1992) (MSPB has jurisdiction over whistleblower complaints not involving reserved right).
3. Appeal precluded by exercise of grievance/arbitration rights under negotiated grievance procedure.
- a. Appealable action involving discrimination under 5 U.S.C. § 2302(b)(1) (mixed cases)--employee elects forum, but MSPB may review grievance/arbitration decision. *Capriles v. Panarna Canal Comm'n*, 65 M.S.P.R. 221 (1994); *Means v. Dep't of Labor*, 63 M.S.P.R. 180 (1994); *Leary v. Dep't of Navy*, 60 M.S.P.R. 529 (1994).
 - b. Adverse actions under 5 U.S.C. § 7512 and performance cases under 5 U.S.C. § 4304 (nonmixed cases). Employee elects forum; election is binding. 5 C.F.R. § 1201.3(c). *Morales v. Merit Sys. Protection Bd.*, 823 F.2d 536 (Fed. Cir. 1987); *Billops v. Dept of Air Force*, 725 F.2d 1160 (8th Cir. 1984); *Nelson v. Dep't of Treasury*, 58 M.S.P.R. 464 (1993);
 - c. Other actions grievable under negotiated grievance procedure - no MSPB jurisdiction. *Sirkin v. Dep't of Labor*, 16 M.S.P.R. 432 (1983) (RIF); *Lovshin v. Dep't of Navy*, 16 M.S.P.R. 14 (1983) (denial of step increase).
4. Appeal precluded by election of EEOC complaint process. 5 C.F.R. § 1201.151--161. *Ferdon v. U.S. Postal Serv.*, 60 M.S.P.R. 325 (1994).

IV. PROCESSING AN APPELLATE CASE. 5 U.S.C. § 7701; 5 C.F.R. PART 1201.

- A. Agency Decision Notice. 5 C.F.R. § 1201.21.
- 1. Contains notice of time limits, effect of missing time limits, and address for appeal. *Walls v. Merit Systems Protection Bd.*, 29 F.3d 1578 (Fed. Cir. 1994).
 - 2. A copy (or access to copy) of MSPB regulations.
 - 3. Appeal form (or online reference to MSPB form or e-filing).
 - 4. Notice of grievance rights (if any).

- B. Employee Appeal. 5 C.F.R. § 1201.22. The following rules of filing apply to **all** submissions to the Board (appellant or agency).
1. Methods of filing: personal delivery, commercial delivery, FAX, mail, or e-filing. 5 C.F.R. § 1201.22(d)
 2. Date of filing. 5 C.F.R. § 1201.4(1). Late is late.
 - a. Personal delivery -- date of receipt by MSPB. *Cohen v. Dep't of Commerce*, 56 M.S.P.R. 578 (1993).
 - b. FAX -- date of receipt of FAX (as recorded on transmission by receiving FAX machine). *Jude v. Dep't of Treasury*, 52 M.S.P.R. 5 (1991).
 - c. Mail -- postmark (or presumption of 5 business days before receipt if no legible postmark). *Jordan v. Dep't of Treasury*, 64 M.S.P.R. 242 (1994). But see *Zicht v. Health and Human Servs.*, 56 M.S.P.R. 9 (1992); *Raphel v. Dep't of Army*, 50 M.S.P.R. 614 (1991).
 - d. Delivery by private express companies. The MSPB previously found that filing by delivery company was a personal delivery rather than mail. Amended rules now treat these deliveries as similar to mail: filing is completed when the pleading is given to the delivery company. See 5 C.F.R. § 1201.4(1). See also *McDavid v. Dep't of Labor*, 64 M.S.P.R. 304 (1994); *Ally v. Dep't of Navy*, 58 M.S.P.R. 680 (1993).
 - e. Internet filing option. An appeal may be filed electronically by using the electronic filing option available at the Board's website, (<https://e-appeal.mspb.gov/>).
 3. Time for filing -- 30 days.
 - a. Waiver of time requirement for good cause. 5 C.F.R. § 1201.22(c). *Walls v. Merit Systems Protection Bd.*, 29 F.3d 1578 (Fed. Cir. 1994); *Anderson v. Dep't of Justice*, 999 F.2d 532 (Fed. Cir. 1993); *Crawford v. Dep't of State*, 60 M.S.P.R. (1994).
 - (1) Employee has the burden of demonstrating good cause.
 - (2) Employee must show due diligence or ordinary prudence under the circumstances of the case.
 - (3) The only relevant factor is whether there is a "reasonable excuse"--any doubts should be resolved in favor of the appellant. *Calfee v. OPM*, 64 M.S.P.R. 309 (1994); *Sanford*

v. Dep't of Defense, 61 M.S.P.R. 207 (1994).

- b. Discretion to grant evidentiary hearing on timeliness issue. See *Bagge v. Dep't of Navy*, 38 M.S.P.R. 326 (1988).

C. Acknowledgment Order.

- 1. Standard form
- 2. Show Cause Orders: Jurisdictional issues. *Martinez v. MSPB*, 126 F.3d 1480 (Fed. Cir. 1997).

D. Agency Response.

- 1. Time -- 20 days. 5 C.F.R. § 1201.22(b).
- 2. Consequences of late filing. *Johnson v. Dist. of Columbia Bd. of Education*, 7 M.S.P.R. 652 (1981).
- 3. Content. 5 C.F.R. § 1201.25.
 - a. Identity of parties.
 - b. Narrative response stating reasons for action.
 - c. Adverse action file.
 - d. Designation of agency representative.
 - e. Other documents or responses requested by the Board.

E. Motion Practice. 5 C.F.R. § 1201.55.

- 1. Form.
- 2. Coordination with opposing party required before filing procedural motions, including extensions of time and postponing hearing.
- 3. Commonly asserted motions.
 - a. Motion to dismiss for lack of jurisdiction.
 - b. Motion for extension of time. 5 C.F.R. § 1201.55(c).
 - c. Motion to postpone hearing. 5 C.F.R. § 1201.51(c).
 - d. Summary judgment is precluded in MSPB cases with one exception. In *Redd v. USPS*, 101 M.S.P.R. 182 (2006), the Board decided that summary judgment may be used to dismiss, prior to hearing, EEO affirmative defenses that do not present a genuine issue of disputed material fact.
- 4. Time for opposition to written motions -- 10 days from service of

motion.

F. Discovery. 5 C.F.R. §§ 1201.71 – 75.

1. Purposes.
2. Scope.
 - a. Nonprivileged.
 - b. Relevant ("appears reasonably calculated to lead to the discovery of admissible evidence").
3. Methods.
 - a. Any method provided for in Federal Rules of Civil Procedure.
 - (1) Written interrogatories.
 - (2) Requests for production of documents.
 - (3) Requests for admission.
 - (4) Depositions. Beware of time frames involved.
 - b. Federal Rules of Civil Procedure are "instructive."
4. Procedures.
 - a. Discovery from a party. 5 C.F.R. § 1201.73.
 - (1) Initial request -- within 25 days of acknowledgment order.
 - (2) Responses or objections are due within 20 days of service of request.
 - (3) Follow up requests are due within 10 days of service of prior response.
 - b. Discovery from a nonparty.
 - (1) Voluntary discovery when possible.
 - (2) Motion and order for discovery from nonparty.
 - (3) Response or objection -- within 20 days of service of request (voluntary) or 20 days from order for discovery.

- (4) Follow up request -- within 10 days of service of prior response.
- c. Motion to compel discovery.
 - (1) Filed within 10 days of date of service or objections (or 10 days after time limit for response expires).
 - (2) Content of motion to compel.
 - (a) Original request.
 - (b) Response and objections (or affidavit or declaration under 28 U.S.C. § 1746 that no response has been received).
 - (c) Statement showing that information sought is relevant and material.
 - (3) Opposition to motion to compel - 10 days from date of service of motion.
- d. Motion for protective order. 5 C.F.R. § 1201.55(d).

NOTE: Agency counsel will frequently want to request that the administrative judge delay any discovery going to the merits of the case until after a jurisdictional issue has been resolved. See *Kostan v. Arizona Nat'l Guard*, 45 M.S.P.R. 173 (1990).

- e. Sanctions for noncompliance with order compelling discovery. 5 C.F.R. §§ 1201.43 and 1201.74(c).
 - (1) Adverse inference.
 - (2) Exclude evidence and testimony.
 - (3) Permit use of secondary evidence.
 - (4) Rule against noncompliant party on issue.

G. Prehearing Submissions and Prehearing Conference(s).

- 1. Prehearing submissions. Binding on parties.
 - a. Statement of facts and issues, including affirmative defenses.
 - b. Stipulations.
 - c. Witness list with summary of expected testimony.
 - d. Exhibits.

2. Prehearing conference(s).
 - a. Purposes.
 - (1) Facilitate discovery.
 - (2) Focus issues for resolution.
 - (3) Obtain stipulations.
 - (4) Rule on witnesses and exhibits.
 - (5) Discuss settlement.
 - b. Record of conferences.

H. Hearing.

1. Right to a hearing
 - a. Employee has statutory right. 5 U.S.C. § 7701(a).
 - (1) Timely request.
 - (2) Waiver.
 - (3) Can be Video Teleconference (preferred).
 - b. Agency has no right. *Walker v. Veterans Admin.*, 4 M.S.P.R. 78 (1980); *Thompson v. U.S. Coast Guard*, 11 M.S.P.R. 461 (1982).
2. Scheduling the hearing -- not earlier than 15 days after notice. 5 C.F.R. § 1201.51.
3. Location. 5 C.F.R. § 1201.51(d).
 - a. Approved locations. 5 C.F.R. Part 1201, Appendix III.
 - b. Motion to change location.
 - (1) Good cause -- a different location will be more advantageous to all parties and the Board.
 - (2) Standard of review -- prejudice: location affected substantive rights of parties. *Pope v. Dep't of Transportation*, 12 M.S.P.R. 93 (1982).
4. Order of hearing and burdens of proof. 5 C.F.R. §§ 1201.56-.57.
 - a. Jurisdiction and timeliness of appeal.
 - (1) Employee has burden and presents case first.

- (2) Preponderance of the evidence.
- b. Performance-based and misconduct actions.
 - (1) Agency has burden.
 - (2) Performance-based action: substantial evidence.
 - (3) Misconduct-based action: preponderance of evidence.
- c. Affirmative defenses -- employee has the burden of proof by preponderance of evidence.
 - (1) Harmful procedural error
 - (a) Statutory violations
 - (b) Violations of Agency Regulations or Collective Bargaining Agreement
 - (c) Failure to follow basic procedures
 - (2) Prohibited personnel practice (This includes various forms of discrimination and reprisal for whistleblowing.)
 - (3) Not in accordance with law
- d. Special Counsel actions. *Eidmann v. Merit Sys. Protection Bd.*, 976 F.2d 1400 (Fed. Cir. 1992).
 - (1) Corrective action on behalf of employee. 5 U.S.C. § 1214.
 - (2) Disciplinary action against supervisor. 5 U.S.C. § 1215.

I. Record.

- 1. Content. 5 C.F.R. § 1201.54.
 - a. Pleadings.
 - b. Orders and decisions.
 - c. Exhibits.
 - d. Verbatim record of testimony (tape recording or transcript). 29 C.F.R. § 1201.53.
- 2. Closing the record. 5 C.F.R. § 1201.58.

J. Initial Decision by Administrative Judge. 5 C.F.R. § 1201.111.

- 1. Content.
 - a. Findings of fact and conclusions of law with reasons therefor.

Hillen v. Dep't of Army, 35 M.S.P.R. 453 (1987).

- b. Order making final disposition.
 - c. If employee prevails, statement regarding interim relief.
 - d. Date decision will become final (35 days after initial decision unless timely petition for review filed).
 - e. Review and appeal rights.
2. Interim relief. 5 U.S.C. § 7701(b)(2); 5 C.F.R. § 1201.111(c).
- a. Agency options.
 - (1) Grant ordered relief.
 - (2) Place employee in paid, nonduty status if agency determines that employee's presence at worksite would be unduly disruptive. *Scofield v. Dep't of Treasury*, 53 M.S.P.R. 179 (1992) (MSPB has no authority to review determination that reinstatement would be unduly disruptive).
 - (3) Detail or assign the employee to a position other than the former position, or return him to the former position with restricted duties. The employee must receive the same pay and benefits as in the former position. The agency decision is NOT subject to review for bad faith. *King v. Jerome*, 42 F.3d 1371 (Fed. Cir. 1994), rev'ing, *Jerome v. Small Business Admin.*, 56 M.S.P.R. 181 (1993).
 - (4) The agency may reinstate employee under interim relief order by temporary appointment pending outcome of PFR. *Avant v. Dep't of Navy*, 60 M.S.P.R. 467 (1994).
 - b. Failure to produce evidence of compliance with (1) or (2) above before the date the petition for review is due will result in dismissal of agency's petition for review. 5 C.F.R. § 1201.115(b)(4); *Shaishaa v. Dep't of Army*, 60 M.S.P.R. 359 (1994); *White v. U.S. Postal Serv.*, 60 M.S.P.R. 314 (1994); *Reid v. U.S. Postal Serv.*, 61 M.S.P.R. 84 (1994); *Harrell v. Dep't of Army*, 60 M.S.P.R. 164 (1993).
 - c. An employee may challenge the agency's compliance with an interim relief order by moving to dismiss the agency's petition for review. *Ginocchi v. Dep't of Treasury*, 53 M.S.P.R. 62 (1992).
 - d. KEY POINT - Do not cancel the underlying action if the AJ orders interim relief. The appeal then becomes moot! *Cain v. Defense*

Commissary Agency, 60 M.S.P.R. 629 (1994); *Trotter v. Dep't of Defense*, 54 M.S.P.R. 563, 564 (1992).

3. Initial decisions lack precedential value. 5 C.F.R. § 1201.113.
- K. Petition for review (PFR). 5 C.F.R. §§ 1201.114-.117.
1. Time limits.
 - a. PFR -- 35 days after initial decision issued. *Hall v. Dep't of Army*, 59 M.S.P.R. 161 (1993).
 - b. Cross-petition for review -- 25 days after service of PFR.
 - c. Response to PFR or cross-petition -- 25 days after service of PFR or cross-petition.
 2. Grounds for granting petition. 5 C.F.R. § 1201.115(c); *Dunning v. NASA*, 718 F.2d 1170 (D.C. Cir. 1983).
 - a. New and material evidence.
 - b. Erroneous interpretation of law or regulation.
 3. Proof of interim relief.
- L. MSPB Review of Initial Decision. 5 C.F.R. § 1201.116.
1. Nature.
 - a. Written briefs.
 - b. Oral argument.
 2. Action.
- M. Intervention Before the Board. 5 C.F.R. §§ 1201.34 and 1201.114(g).
1. Intervention of right.
 - a. Director, OPM.
 - b. Special Counsel.
 2. Permissive intervenors -- anyone who will be directly affected by the outcome of the proceeding.
 3. Amicus curiae -- discretion of Board.
- N. OPM Petition for Reconsideration. 5 U.S.C. § 7703(d); 5 C.F.R. § 1201.118.
1. Grounds.
 - a. Board erred in interpreting civil service law, rule, or regulation

affecting personnel management.

- b. Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive.

NOTE: The MSPB may not question the authority of OPM to seek reconsideration; OPM may seek reconsideration whenever factual issues are in dispute. *King v. Lynch*, 21 F.3d 193 (Fed. Cir. 1994), reversing *Newman v. Lynch*, 897 F.2d 1144 (Fed. Cir. 1990).

2. Time -- 35 days after date of service of Board's order on the employing agency (generally not OPM).

O. Judicial Review.

1. Review is by the U.S. Court of Appeals for the Federal Circuit (CAFC). 5 U.S.C. § 7703; 5 C.F.R. § 1201.119. This court must affirm the Board's decision unless it is: (1) arbitrary, capricious, and an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule or regulation being followed; or (3) unsupported by substantial evidence. *Gose v. USPS*, 451 F.3d 831 (Fed. Cir. 2006)
2. The jurisdiction of the CAFC is concurrent with the jurisdiction of the Board. *Del Marcelle v. Dep't of Treasury*, 59 M.S.P.R. 251 (1993).

V. PROCESSING A MIXED CASE. 5 U.S.C. § 7702; 5 C.F.R. PART 1201, SUBPART E.

- A. Election of Remedies.
- B. Time for Filing Appeal -- 30 days. 5 C.F.R. § 1201.154(a).
- C. Time for Processing Appeal -- 120 days. 5 C.F.R. § 1201.156.
- D. Review of MSPB Decision by EEOC. 5 C.F.R. § 1201.161.
- E. MSPB Action on EEOC Decision. 5 C.F.R. § 1201.162.
 1. Reaffirm original action.
 2. Concur and adopt in whole EEOC decision.
- F. Referral to Special Panel. 5 C.F.R. § 1201.171.
 1. Certification to Special Panel upon reaffirmance of original action.
 2. Membership of Special Panel.
 - a. Chairman of Special Panel (appointed by President with advice and

consent of Senate).

- b. Member appointed by MSPB Chairman.
- c. Member appointed by EEOC Chairman.

G. Judicial Review. 5 C.F.R. § 1201.175.

- 1. Appropriate United States District Court.
- 2. Bifurcated review. *Morales v. Merit Sys. Protection Bd.*, 932 F.2d 800 (9th Cir. 1991); *Rana v. United States*, 812 F.2d 887 (4th Cir. 1987).
 - a. De novo review of discrimination issues.
 - b. Record review of nondiscrimination issues.

VI. SETTLEMENT. 5 C.F.R. § 1201.41(C).

A. Policy. *Martin v. U.S. Postal Serv.*, 34 M.S.P.R. 326 (1987).

B. Role of the Administrative Judge.

- 1. Initiation of settlement discussion.
- 2. Waiver of prohibitions against ex parte communications. 5 C.F.R. § 1201.47(c).

C. Including Settlement Agreement in Record.

- 1. Requires initial determination of jurisdiction over the appeal.
- 2. Either party may file agreement.
- 3. Administrative judge must approve agreement.
- 4. Effect.
 - a. Dismissal of appeal with prejudice.
 - b. MSPB retains jurisdiction to ensure compliance with agreement.

D. Content of Agreement.

1. Waiver of statutory rights. *Rogers v. U.S. Postal Serv.*, 59 M.S.P.R. 647 (1993). MSPB right to review and jurisdiction subject to bad faith determination. *McCall v. Postal Service*, 839 F.2d 664 (Fed. Cir. 1988); *Silva v. Postal Service*, 59 MSPR 268 (1993), *aff'd* 40 F.3d 1250 (Fed.Cir. 1994).
 2. Attorney fees.
 3. OWBPA: CAUTION needed in mixed cases alleging age discrimination.
- E. Setting Aside a Settlement Agreement.
1. Agreement must have been received into record. *Gorelick v. OPM*, 45 M.S.P.R. 81 (1990).
 2. Grounds. *Dos Santos v. Veterans Admin.*, 56 M.S.P.R. 399 (1993).
 - a. Coercion.
 - b. Lack of authority of representative.
 - c. Fraud.
 - d. Mutual mistake.

VII. RELIEF.

- A. MSPB Authority. 5 U.S.C. § 1204(a)(2).
1. Affirm or overturn agency decision. See *Burroughs v. Dep't of Army*, 918 F.2d 170 (Fed. Cir. 1990); *Weaver v. Dep't of Agric.*, 55 M.S.P.R. 569 (1992).
 2. Mitigation of penalty in Chapter 75 cases. *Kirk v. Defense Logistics Agency*, 59 M.S.P.R. 523 (1993).
- B. Traditional Remedies -- Status Quo Ante.
- C. Stay of Personnel Action.
- D. Interim Relief. 5 C.F.R. Part 772.
- E. Attorney Fees. 5 U.S.C. § 7701(g)(1); 5 C.F.R. § 1201.37.
1. Entitlement criteria under 5 U.S.C. § 7701(g); *Van Fossen v. Merit Sys. Protection Bd.*, 788 F.2d 748 (Fed. Cir. 1986); *Sterner v. Dep't of Army*, 711 F.2d 1563 (Fed. Cir. 1983); *Roth v. U.S. Postal Serv.*, 54 M.S.P.R. 298 (1992).
 - a. Prevailing party. *Irwin v. Small Business Admin.*, 45 F.3d 417

(Fed. Cir., 1995); *Ray v. Health and Human Serv.*, 64 M.S.P.R. 100 (1994).

- (1) Obtained an enforceable judgment or enforceable relief by settlement:
 - (2) Relief is significantly due to initiation of MSPB proceeding.
 - (3) Attorney fees were incurred, and amount of fees is reasonable.
- b. Fees warranted in the interests of justice. *Rose v. Dep't of Navy*, 36 M.S.P.R. 352 (1988); or
 - c. Charges clearly without merit. *Hutchcraft v. Dep't of Transportation*, 55 M.S.P.R. 138 (1992).
2. Entitlement criteria under 42 U.S.C. § 2000e-5(k).
 - a. Prevailing party.
 - b. Decision is based on finding of discrimination.
 - c. No interest of justice standard.
 3. Entitlement criteria under 5 U.S.C. § 1221(g).
 - a. Prevailing party.
 - b. Decision based on a finding of a prohibited personnel practice.
 - c. No interest of justice standard.
 4. Entitlement criteria under 5 U.S.C. § 1204(m).
 - a. Prevailing party in disciplinary action brought by OSC.
 - b. Fees warranted in the interests of justice or charges clearly without merit.
 5. Reasonable fees.
 - a. General rule -- lodestar (customary rate or prevailing market rate x number of hours reasonably expended). *Heath v. Dep't of Transportation*, 66 M.S.P.R. 101 (1995); *Blum v. Stenson*, 465 U.S. 886 (1984); *Montreuil v. Dep't of Air Force*, 55 M.S.P.R. 685 (1992).
 - b. Fees for union attorneys. *Goodrich v. Dep't of Navy*, 733 F.2d 1578 (Fed. Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985); *Powell v. Dep't of Treasury*, 19 M.S.P.R. 174 (1984) (cost = salary +

overhead). *But cf. AFGE, Local 3882 v. FLRA*, 944 F.2d 922 (D.C. Cir. 1991) (market rate for union attorney in FLRA proceeding); *Kean v. Stone*, 968 F.2d 119 (3d Cir. 1993) (market rate where discrimination found).

- c. No enhancement for contingent fee arrangements. *City of Burlington v. Dague*, 112 S. Ct. 2638 (1992); *Pecotte v. Dep't of Air Force*, 55 M.S.P.R. 165 (1992).
- d. Travel expenses are recoverable as part of an attorney fees award. *Wilson v. U.S. Postal Serv.*, 58 M.S.P.R. 653 (1993).

6. Fee petition.

- a. Time for filing.
 - (1) 20 days after initial decision becomes final; or
 - (2) 25 days after issuance of final decision if PFR filed.
- b. Content.
 - (1) Statement of why entitled to fees.
 - (2) Contemporaneous time records.
 - (3) Terms of fee agreement (if any).
 - (4) Evidence of customary or market rate.
- c. Opposition to petition.
 - (1) Time -- set by judge.
 - (2) Inflated petition. *See Keener v. Dep't of Army*, 136 F.R.D. 140 (M.D. Tenn. 1991), *affirmed* 956 F.2d 269 (6th Cir. 1992).
- d. PFR on decision on fee petition—35 days.

VIII. COMPLIANCE AND ENFORCEMENT.

- A. Statutory Authority. 5 U.S.C. §§ 1204(a)(2) and 1204(d)(2).
- B. Petition for Enforcement. 5 C.F.R. §§ 1201.181-183.

IX. CONCLUSION.

CHAPTER E

Introduction to Federal Labor-Management Relations

TABLE OF CONTENTS

I. REFERENCES/RESOURCES.....	2
II. INTRODUCTION.....	3
III. BASIC TERMINOLOGY.....	3
A. AGENCY.....	3
B. EMPLOYEE.....	5
C. BARGAINING UNIT.....	5
D. EXCLUSIVE REPRESENTATIVE.....	11
IV. PROGRAM AUTHORITIES	12
A. FEDERAL LABOR RELATIONS AUTHORITY	12
B. GENERAL COUNSEL	13
C. ADMINISTRATIVE LAW JUDGES N	14
D. FEDERAL SERVICES IMPASSES PANEL.....	14
V. UNION ORGANIZING	14
A. ELECTIONS	14
B. NONEMPLOYEE ACCESS ON THE INSTALLATION	17
C. EMPLOYEES' RIGHT TO SOLICIT UNION MEMBERSHIP ON THE INSTALLATION	18
D. MANAGEMENT NEUTRALITY	19
VI. SCOPE OF COLLECTIVE BARGAINING	20
A. PHILOSOPHY.....	20
B. BARGAINING IN GOOD FAITH.....	20
C. WHEN TO BARGAIN	23
D. WHAT TO BARGAIN	24
VII. IMPASSE RESOLUTION	39
VIII. REPRESENTATIONAL RIGHTS.....	41
A. FORMAL DISCUSSIONS.....	41
B. INVESTIGATORY EXAMINATIONS	42
C. FACT-GATHERING SESSIONS AND BROOKHAVEN WARNINGS	43
IX. UNFAIR LABOR PRACTICES.....	44
X. GRIEVANCE/ARBITRATION.....	48
XI. SUCCESSORSHIP AND ACCRETION.....	48
XII. CONCLUSION.....	50

Introduction to Labor-Management Relations

The Congress finds that [union participation]-safeguards the public interest, contributes to the effective conduct of public business, and facilitates and encourages the amicable settlement of disputes between employees and their employers involving conditions of employment . . . Therefore, labor organizations and collective bargaining in the civil service are in the public interest. (5 U.S.C. § 7101).

I. REFERENCES/RESOURCES.

- A. Title VII of the Civil Service Reform Act (Federal Service Labor-Management and Employee Relations Statute), 5 U.S.C. § 7101, *et seq.*
- B. Executive Order 13522, Creating Labor-Management Forums to Improve Delivery of Government Services (December 14, 2009).
- C. 5 C.F.R. Chapter XIV, Federal Labor Relations Authority, General Counsel of the Federal Labor Relations Authority and Federal Services Impasses Panel.
- D. DoD Instruction 1400.25, Subchapter 711, Labor-Management Relations, July 2012.
- E. Government Reporting Services.
 - 1. Reports of the Federal Labor Relations Council/Authority (published by U.S. Gov't Printing Office).
 - 2. Releases of the Federal Service Impasses Panel (published by U.S. Gov't Printing Office).
- F. *The Army Lawyer*, Labor and Employment Law Notes.
- G. Peter. B. Broida, A Guide to Federal Labor Relations Authority Law and Practice, 28th edition, 2015 (Dewey Publications, Inc. 2015).
- H. U.S. Army Judge Advocate General's Corps JAGCNet at jagcnet.army.mil.
- I. *cyberFEDS*® Federal Employment research service, www.cyberfeds.com.

II. INTRODUCTION.

- A. Union Representation in the Army.
 - 1. Appropriated Fund (AF):
 - 2. Nonappropriated Fund (NAF):
 - 3. Different Unions represent Army employees including:
 - a. AFGE – American Federation of Government Employees
 - b. NTEU – National Treasury Employees Union
 - c. NAGE – National Association of Government Employees
 - d. ACT – Association of Civilian Technicians
 - e. IFPTE – International Federation of Professional and Technical Engineers
- B. Responsibilities of the Labor Counselor.
 - 1. Aids in making policies and procedures for the administration of labor/management relations.
 - 2. Participates in contacts with the exclusive representative.
 - 3. Represents management (command) in third-party proceedings.
 - 4. Renders legal advice to the management team when it is negotiating a collective bargaining agreement (CBA).
 - 5. Renders legal advice on the interpretation and application of the CBA.

III. BASIC TERMINOLOGY.

- A. Agencies of the Federal Sector. This includes any Executive branch agency, the Library of Congress, and the Government Printing Office. It excludes most agencies with law enforcement and national security missions.
 - 1. Agencies that are specifically excluded include (5 USC § 7103(a)(3)):
 - a. The General Accounting Office;
 - b. The Federal Bureau of Investigation;

- c. The Central Intelligence Agency;
- d. The National Security Agency;
- e. The Tennessee Valley Authority;
- f. The Federal Labor Relations Authority;
- g. The Federal Service Impasses Panel; and
- h. The United States Secret Service and the United States Secret Service Uniformed Division.

2. President's Authority.

- a. The President may issue an order excluding any agency or subdivision of any agency from the coverage of the Statute if the President determines that (5 U.S.C. § 7103(b)):
 - (1) The agency or subdivision has as a primary function intelligence, counterintelligence, investigative, or national security work, and
 - (2) The provisions of the Statute cannot be applied to that agency or subdivision in a manner consistent with national security requirements and considerations.
 - (3) Executive Order 12171 (November 19, 1979), as amended, exempt from coverage of the Statute, pursuant to § 7103(b), numerous subdivisions of the Department of Treasury, Department of Energy, Department of Homeland Security, Department of Justice, Department of Transportation, Department of the Army, Department of the Navy, and Department of the Air Force.
 - (4) Executive Order 12171 has been amended by EO 12338, January 11, 1982; EO 12410, March 28, 1983; EO 12559, May 20, 1986; EO 12632, March 23, 1988; EO 12666, January 12, 1989; EO 12671, March 14, 1989; EO 12681, July 6, 1989; EO 12693, September 29, 1989; EO 13039, March 11, 1997; EO 13252, January 7, 2002; EO 13381, June 27, 2005; EO 13467, June 30, 2008; EO 13480, November 26, 2008.

b. The President may issue an order suspending any provision of the Statute with respect to any agency, installation, or activity located outside the 50 States and the District of Columbia if the President determines that the suspension is necessary in the interest of national security. 5 U.S.C. § 7103(b)(2).

(1) *DOD, DA and 8th Army, Korea v. FLRA and NFFE*, 685 F.2d 641 (D.C. Cir. 1982).

(2) Executive Order 12391, 4 November 1982. Partial Suspension of Federal Service Labor-Management Relations Statute Overseas.

B. Employee. 5 U.S.C. § 7103(a)(2).

1. Person employed in an agency, or person whose employment has terminated because of an Unfair Labor Practice (ULP).

2. Statutory exclusions.

a. Alien or noncitizen of the U.S. who occupies a position outside the U.S.;

b. Member of the uniform services;

c. Supervisor or a management official;

d. An officer or employee in the Foreign Service of the U.S. employed in the Department of State, the International Communication Agency, the U.S. International Development Cooperation Agency, the Department of Agriculture, or the Department of Commerce; or

e. Any person who participates in a strike in violation of 5 USC § 7311.

C. Bargaining Unit. Group of employees with similar interests.

1. Statutory criteria. 5 U.S.C. § 7112(a). The Authority examines the totality of the circumstances in each case in making appropriate unit determinations under § 7112(a)(1) of the Statute. *Naval Fleet and Industrial Supply Center, Norfolk and AFGE Local 53*, 52 FLRA 950 (1997); *DOJ, Office of the Chief Immigration Judge, Chicago, and AFGE*, 48 FLRA 620 (1993).

2. Bargaining unit determinations are made based on duties actually performed at the time of the hearing. *Pentagon Force Protection Agency*, 62 FLRA 164 (2007). However, duties that have not actually been assigned to an employee will be considered assigned duties where it can be shown that, apart from the position description, the employee has been informed the duties will be assigned, the nature of the job clearly requires the duties, and the employee is not performing the duties solely because of a lack of experience. *Food Safety and Inspection Service*, 61 FLRA 397 (2005).
3. In determining appropriate bargaining units, the FLRA considers three factors:
 - a. The unit must ensure a clear and identifiable community of interest among the employees in the unit.
 - (1) The Authority has not specified individual factors or the number of factors required to determine that employees share a community of interest. *Health and Human Services, Region II, and NTEU*, 43 FLRA 1245 (1992).
 - (2) In order to determine whether employees share a clear and identifiable community of interest, the FLRA examines such factors as whether the employees in the unit are a part of the same organizational component of the agency; support the same mission; are subject to the same chain of command; have similar or related duties, job titles and work assignments; are subject to the same general working conditions; and are governed by the same personnel and labor relations policies that are administered by the same personnel office. *Securities and Exchange Commission*, 56 FLRA 312 (2000).
 - (3) The FLRA requires that factors in determining whether a community of interest exists be examined on a case-by-case basis. *Letterkenny Army Depot*, 47 FLRA 969 (1993).
 - b. The unit must promote effective dealings with the agency involved.
 - (1) Will there be authority at the level of organization to make decisions for the group?

- (2) Factors to consider include: the level at which negotiations will take place, at what point grievances will be processed, whether substantial authority exists at the level of the unit sought, and bargaining history. *U.S. DoD, National Guard Bureau and Association of Civilian Technicians*, 55 FLRA 657 (1999) (concluding that a proposed consolidation of existing bargaining units in 39 states and representing about 53% of eligible National Guard technicians nationwide was not appropriate); *DLA, Defense Plant Representative Office-Thiokol, and NFFE*, 41 FLRA 316, 328-329 (1991).
 - (3) Reducing and preventing unit fragmentation tends to promote effective dealings. *Library of Congress*, 16 FLRA 429 (1984).
 - c. The unit must promote efficiency of the operations of the agency involved.
 - (1) Is the unit size and make-up appropriate to allow for necessary interactions without duplication of effort and excessive disruption of the mission?
 - (2) Factors to consider include: relationship of the bargaining unit to the agency's organizational and operational structure; the degree to which there is interchange outside the unit sought; the extent of differences with other groups of employees outside the unit sought; whether negotiations would cover problems common to employees in the unit; and bargaining history. *See Naval Fleet and Industrial Supply Center, Norfolk and AFGE Local 53*, 52 FLRA 950 (1997); *See also U.S. DoD, Nat'l Guard Bureau and Association of Civilian Technicians*, 55 FLRA 657 (1999).
4. Mandatory Exclusions. A unit cannot include any of the following categories of employees:
 - a. Any management officials or supervisors, unless they have been historically included in the unit.

- (1) Supervisors. 5 U.S.C. §§ 7103(a)(10) and 7112(b)(1); An employee will be considered a supervisor if the employee consistently exercises independent judgment with regard to one or more of the supervisory indicia set forth in the statute. *National Mediation Board*, 56 FLRA 1 (2000); *DVA Medical Center, Allen Park, Mich*, 35 FLRA 1206 (1990). The determination of supervisory status depends upon actual duties performed along with the consistent exercise of independent judgment, and not on the classification of the position. *Army and Air Force Exchange Service, Base Exchange, Fort Carson, Colo*, 3 FLRA 595 (1980).
- (a) Can they hire, fire, assign work, promote, suspend, or recommend any of the above in more than just a clerical capacity?
- (b) Must supervise “employees” as defined in 5 U.S.C. § 7103. This definition does not include an alien or noncitizen who occupies a position outside the United States or a member of the uniformed services. *National Guard Bureau, State of New York*, 9 FLRA 16 (1982); *Interpretation and Guidance*, 4 FLRA 754 (1980).
- (c) Team Leads. Employees designated as team leaders may be supervisors for unit exclusion purposes if they exercise independent judgment in the performance of one or more indicia of supervisory authority. *Army Aviation Systems Command*, 36 FLRA 587 (1990); a team leader who considers a number of factors when assigning work to team members, such as employee expertise, workload availability, and work priorities, and exercises independent judgment in doing so, meets the definition of a supervisor. *Western Area Power Administration*, 60 FLRA 6 (2004).
- (d) Firefighters and Nurses qualify as supervisors only if they devote a preponderance of their time to the performance of supervisory duties.

- (2) Management officials. 5 U.S.C. §§ 7103(a)(11) and 7112(b)(1); an individual employed by an agency in a position the duties and responsibilities of which require or authorize the individual to formulate, determine, or influence the policies of the agency.
 - (a) An individual who only "effectuates" policy is not a management official. *Executive Office of Immigration Review*, 56 FLRA 616 (2000).
 - (b) Although military personnel are not "employees" as defined in the statute, a civilian who develops policy applicable only to military personnel may be a management official. *8th Coast Guard District*, 35 FLRA 84 (1990).
 - (c) Individuals whose advice was considered authoritative and whose recommendations were accepted, but who did not have the authority to commit the agency to a course of action or to authorize the expenditure of funds, were not management officials. *Federal Crop Insurance Corporation*, 46 FLRA 1457 (1993).
- b. Any confidential employee. 5 U.S.C. §§ 7103(a)(13) and 7112(b)(2); an employee who acts in a confidential capacity with respect to an individual who formulates or effectuates management policies in the field of labor-management relations. *See GSA National Archives and Records Service*, 8 FLRA 333 (1982) (member of management negotiating team); *SSA and AFGE*, 56 FLRA 1015 (2000) (holding that legal assistants are not confidential employees).
- c. Any employee engaged in personnel work in other than a purely clerical capacity. 5 U.S.C. § 7112(b)(3).
 - (1) The Authority has held that advising management regarding "the development of employee policies and procedures" falls within the category of federal personnel work. *Department of Health and Human Services, Seattle, WA*, 9 FLRA 518 (1982).

- (2) The authority has held that human resources specialists, GS-0201, grades 5 through 13, working in classification, recruitment and placement, compensation, benefits, and information technology did not use independent judgment or discretion rising above the routine, and were therefore performing purely clerical work. *Forest Service*, 64 FLRA 239 (2009).
- d. Any employee engaged in administering the provisions of the Statute. 5 U.S.C. § 7112(b)(4). See *National Mediation Bd. and AFGE*, 54 FLRA 1474 (1998) (holding that a union was precluded from representing a proposed unit that contained employees who administer a labor relations statute that covers members of unions affiliated with the petitioning union); *National Mediation Bd. and American Fed'n of Gov't Employees, AFL-CIO*, 56 FLRA 1, *reconsideration denied*, 56 FLRA 320 (2000) (Section 7112(c) of the Statute sets forth the conditions under which an employee engaged in administering provisions of law relating to labor-management may not be represented by a labor organization. Defining the term "administering," the Authority determined that employees who are not responsible for managing, carrying-out, or otherwise executing a provision of law relating to labor-management relations may be included in an appropriate bargaining unit.).
 - e. Professional employees are not in the same unit as other employees unless a majority of the professional employees vote for inclusion in the unit. 5 U.S.C. §§ 7103(a)(15) and 7112(b)(5).
 - (1) A professional employee means an employee engaged in the performance of work:
 - (a) Requiring the knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or hospital;
 - (b) Requiring the consistent exercise of discretion and judgment in its performance;
 - (c) Which is predominantly intellectual and varied in character (as distinguished from routine mental, manual, mechanical, or physical work);

- (d) Which is of such character that the output produced or the result accomplished by such work cannot be standardized in relation to a given period of time; or
 - (2) An employee who has completed the courses of a specialized intellectual instruction and study prescribed above, and is performing related work under an appropriate direction or guidance to qualify the employee as a professional employee.
 - f. Any employee engaged in intelligence, counterintelligence, investigative, or security work that directly affects national security. 5 U.S.C. § 7112(b)(6). Security works “directly affects” national security when it has a straight bearing or unbroken connection that produces a material influence on or alteration of national security. *Social Security Administration, Baltimore*, 59 FLRA 137 (2003); *Department of Energy, Oak Ridge Operations, Oak Ridge, Tenn.*, 4 FLRA 644 (1980).
 - g. Temporary employees. A unit including temporary employees is appropriate if the temporary employees have a reasonable expectation of continued employment and the appropriate unit criteria in § 7112(a) of the Statute is otherwise met. *United States Dep't of the Air Force, Lackland Air Force Base, San Antonio, Tex.*, 59 FLRA 739 (2004). Temporary employees have a reasonable expectation of continued employment where there was no specific term limitation on their employment and they were converted with some frequency to regular appointments. *United States Dep't of the Air Force, 90th Missile Wing (SAC), F.E. Warren Air Force Base, Cheyenne, Wyo.*, 48 FLRA 650 (1993).
- D. Exclusive Representative. Any labor organization which is certified under the Statute as the sole representative of employees in an appropriate unit, or that was recognized as such immediately before the effective date of the Statute and continues to be so recognized. 5 U.S.C. § 7103(a)(16).
 - 1. An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.
 - 2. An exclusive representative must adopt and subscribe to standards of conduct that assure it will maintain democratic principles and a system of financial responsibility. 5 U.S.C. § 7120.

- a. The Assistant Secretary of Labor for Labor Management Relations is responsible for the standards of conduct for labor organizations.
- b. Criteria. 5 U.S.C. § 7103(a)(4). A labor organization cannot:
 - (1) Deny membership because of race, color, creed, national origin, sex, age, civil service status, political affiliation, marital status, or handicapping condition;
 - (2) Advocate the overthrow of the U.S. government;
 - (3) Be sponsored by the agency; or
 - (4) Participate in a strike.
- E. Collective Bargaining Agreement. The contract. An agreement negotiated by management and the exclusive representative.
- F. Unfair Labor Practice. A violation of the statute by either management or labor. The regional director, on behalf of the FLRA general counsel, investigates a ULP charge.
- G. Grievance. Any complaint:
 - 1. By employee concerning any matter relating to the employment of the employee;
 - 2. By any labor organization concerning any matter relating to the employment of any employee; or
 - 3. By any employee, labor organization, or agency concerns the effect or interpretation, or a claim of breach, of a collective bargaining agreement, or any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment.

IV. PROGRAM AUTHORITIES.

A. Federal Labor Relations Authority. 5 U.S.C. § 7104.

1. Organization

- a. Composed of three members, not more than 2 of who may be adherents from the same political party.

- b. Appointed by the President, confirmed by the Senate for a term of 5 years.
 - 2. Responsibilities
 - a. Overall program administration;
 - b. Supervises or conducts elections to determine exclusive recognition of labor organizations;
 - c. Makes negotiability determinations;
 - d. Renders final decisions in unfair labor practices;
 - e. Resolves exceptions to arbitration awards; and
 - f. Resolves disputes concerning appropriateness of bargaining units.
 - 3. All Authority decisions, except those involving unit determinations and arbitration awards not involving unfair labor practices, are subject to judicial review. 5 U.S.C. § 7123(a).
 - 4. The Authority may seek court enforcement of its orders and temporary restraining orders in unfair labor practices.
- B. General Counsel is appointed by, and serves at the pleasure of, the President for a five-year term. 5 U.S.C. § 7104(f).
 - 1. Prosecutes complaints of unfair labor practices.
 - 2. Supervises the Regional Directors.
 - 3. Regional Directors.
 - a. Seven locations: Boston, Washington, D.C., Atlanta, Chicago, Dallas, Denver, and San Francisco.
 - b. Determine appropriate bargaining units.
 - c. Investigate ULPs.
 - d. Supervise elections.

- C. Administrative Law Judges are appointed by the Authority to hear and recommend decisions in unfair labor practice cases and other such matters as they may be assigned. 5 U.S.C. § 7105(e)(2); 5 C.F.R. § 2421.9.
- D. Federal Services Impasses Panel (FSIP) resolves impasses between Federal agencies and unions representing Federal employees arising from negotiations over conditions of employment under the Federal Service Labor-Management Relations Statute and the Federal Employees Flexible and Compressed Work Schedules Act.

V. UNION ORGANIZING.

- A. Elections. 5 U.S.C. § 7111(a). A union that desires a secret ballot election to determine whether employees desire it as their exclusive representative must file a petition seeking election.

1. Timeliness Requirements.

- a. Election Bar. 5 U.S.C. § 7111(b); 5 C.F.R. § 2422.12(a).
 - (1) The Rule: An election is not permitted within 12 months of a previous election in which the union failed to obtain the requisite number of votes.
 - (2) For the rule to apply, the bargaining unit must be the same unit or a subdivision thereof.
- b. Certification Bar. 5 U.S.C. § 7111(f)(4); 5 C.F.R. § 2422.12(b). An election is not permitted within 12 months of certification of a labor organization as the exclusive representative for the bargaining unit. This rule is designed to give activities and newly certified unions time to negotiate their first agreement, and to develop a bargaining relationship.
- c. Contract/Agreement Bar. 5 U.S.C. § 7111(f)(3); 5 C.F.R. § 2422.12(d) & (e).
 - (1) The Rule: A labor organization that desires to displace an incumbent as exclusive representative may file a petition:
 - (a) Upon termination of the CBA if CBA is in existence for 3 years or less, or
 - (b) If the CBA is in existence for greater than 3 years, at the 3 year point.

- (c) If filed not more than 105 days and not less than 60 days before the expiration date of the collective bargaining agreement.
 - d. Bar During Agency Head Review. 5 C.F.R. § 2422.12(c). Bars petitions during any period of agency head review under 5 U.S.C. § 7114. Bar expires after:
 - (1) Thirty days, or
 - (2) Agency head takes action on the Collective Bargaining Agreement.
- 2. Regional Director Conducts or Supervises the Election. 5 C.F.R. § 2422.23.
 - a. Showing of Interest.
 - (1) Definition and Purpose. 5 U.S.C. § 7111(b)(1)(A); 5 C.F.R. § 2421.16. A showing of interest is "evidenced" by employees indicating a desire to be represented by the petitioning labor organization.
 - (2) Evidence of showing of interest.
 - (a) Authorization cards or affidavits.
 - (b) Dues allotment forms or records.
 - (3) Minimum interest requirements. 5 C.F.R. §§ 2422.9 & 2422.10.
 - (a) Thirty (30) percent for original representation petition.
 - (b) Intervening unions – Any labor organization may intervene in representation proceedings with a ten (10) percent showing of interest within 10 days of posting notice of an upcoming election.
 - (c) Incumbent - automatically included.

- (4) Equivalent Status. Equivalent status achieved when Regional Director determines that showing of interest is adequate and notifies parties. *DoD and Education Association of Panama*, 44 FLRA 419 (1992).
 - (a) It is an ULP to assist a labor organization lacking equivalent status. 5 U.S.C. § 7116(a)(3); *Gallup Indian Medical Center, Gallup, New Mexico*, 44 FLRA 217 (1992).
 - (b) Unions with equivalent status are entitled to "customary and routine" services and facilities. *U.S. Army Air Defense Center, Fort Bliss, Texas*, 29 FLRA 362 (1987).
 - (c) Any party may challenge the validity of the petitioner's showing of interest by filing a challenge with the Regional Director before the adequacy hearing opens or, if there is no hearing, prior to the Regional Director taking action on the petition. 5 C.F.R. § 2422.10(c).
- b. Notice of election is posted. 5 C.F.R. § 2422.23(b).
- c. Consent agreement is negotiated.
- d. Observers are appointed. 5 C.F.R. § 2422.23(h).
- e. Challenged ballots are impounded. 5 C.F.R. § 2422.24.
- 3. Labor organization needs the vote of a majority of eligible employees who vote to win. 5 U.S.C. § 7111(a).
 - a. Run-off Election. 5 C.F.R. § 2422.28. A runoff election is conducted when there are at least three choices on the ballot (at least two unions and a "no union" choice) and none of the choices receives a majority of the votes. The runoff will be between the two choices that received the most votes in the original election.
 - b. Inconclusive Election. 5 C.F.R. § 2422.29. Three or more on the ballot, none gets a majority of the valid votes cast and all are tied or all are tied except one who has a greater number (but not majority) of votes. When all of the choices received the same number of votes, or two choices received the same number of votes and the third received more votes, but not a majority, a new

election is held. A new election is also held if there is a tie in a runoff election

4. Objections to Election. 5 C.F.R. § 2422.26. Parties also may object to an election and may move that the election be set aside if the parties believe improper conduct unfairly influenced it.
 - a. Grounds. Improper conduct by any party may be grounds for setting aside an election.
 - b. Regional Director's Preliminary Investigation.
 - c. Hearing if there is a relevant issue of fact. 5 C.F.R. § 2422.27.
 - d. Regional Director issues a decision. 5 C.F.R. § 2422.27(c). This decision may be appealed to the Authority. 5 C.F.R. § 2422.31. After the hearing, the Authority decides the case using the report/recommendation of the administrative law judge as a basis. 5 C.F.R. § 2422.20(i).
5. Certification. 5 C.F.R. § 2422.32. If a union receives a majority of the votes cast, it is certified as the exclusive representative for the bargaining unit. If no union receives a majority of the valid votes cast, an exclusive representative will not be certified. The Regional Director, however, will certify the results of the election.

B. Nonemployee Access on the Installation.

1. No "right" to access. An activity is not required to grant unions and their nonemployee organizers access to the activity's facilities, unless a union demonstrates that its reasonable attempts to communicate with the activity's employees by other means have failed because the employees were inaccessible.
 - a. *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956). The case involved an attempt by union organizers to distribute literature in the private parking lot of a plant. The Court held that an employer may deny access to property by nonemployee union organizers, provided (1) the union is reasonably able to communicate with the employees by other means, and (2) the employer's denial does not discriminate against the union by permitting other unions with equal status to solicit or distribute literature.
 - b. First Amendment Issue. *National Treasury Employees Union v. King*, 798 F.Supp. 780 (D.D.C. 1992) (the NTEU successfully raised a constitutional challenge to the limitation of outside union

solicitation in public areas under the control of a federal agency, when that agency has treated the location as a public forum).

c. In *NTEU v. FLRA*, 139 F.3d 214 (D.C. Cir. 1998), the D.C. Circuit held that the FLRA's reliance on the *Babcock* framework was appropriate in deciding whether a violation of 5 U.S.C. § 7116(a)(1) had occurred. The court, however, disagreed with the FLRA's application of *Babcock*, and held that the SSA had violated 5 U.S.C. § 7116(a)(1). *Id.* at 219. On remand, the Authority applied *Babcock* and found that the SSA violated 5 U.S.C. § 7116(a)(1) in denying NTEU access to the SSA's premises. *SSA and NTEU*, 55 FLRA 964 (1999).

2. Inaccessible Employees. *Barksdale Air Force Base and NFFE*, 45 FLRA 659 (1992) (ULP to allow nonemployee representative unless union can show that despite diligent effort, it has been unable to reach the agency's employees through reasonable, alternative means of communication).

a. Reasonable means include: mailings, TV and radio ads, billboards, information booths at shopping centers or commuter stations, and/or employee organizer(s).

C. Employees' Right to Solicit Union Membership on the Installation.

1. Any activities performed by an employee relating to the internal business of a labor organization, including the solicitation of membership, elections of labor organization officials, and collection of dues, "shall be performed during the time the employee is in a non-duty status." 5 USC § 7131(b).

2. Generally, cannot prohibit solicitation on the installation in non-work areas during non-work time.

a. *Department of Commerce and Hanlon*, 26 FLRA 311 (1987) (ULP to prohibit employee union solicitation in work area during non-work times, absent evidence of disruption);

b. *GSA and Hanlon*, 26 FLRA 719 (1987) (ULP to prohibit showing of union recruiting movie during nonwork times in nonwork areas of federal building, including lobby);

c. *GSA and Hanlon*, 29 FLRA 684 (1987) (ULP to limit times Hanlon could use lobby and content of union materials).

3. May restrict solicitation on the installation. *GSA and NFFE, Local 1705*, 9 FLRA 213 (1982) (to prohibit desk-to-desk distribution of union leaflets

in work area).

4. May restrict wearing of union paraphernalia while on duty. *DOJ v. FLRA*, 955 F.2d 998 (5th Cir. 1992) (Border Patrol officers proposed to wear union pins with uniform); *AFGE and Idaho Army and Air National Guard*, 32 FLRA 539 (1988) (military technicians proposed special patches).
5. Treat exclusive representative equal to private organizations operating on the activity. *IRS and NTEU*, 42 FLRA 1034 (1991) (union request to hold bake sale).

D. Management Neutrality. 5 U.S.C. §§ 7116 (a)(1)-(a)(3) and 7102.

1. Management may not aid, nor hinder, the union organization effort. *Air Force Plant Rep. Office*, 5 FLRA 492 (1981) (commander's published comments "implying that unions were unnecessary, undesirable, and difficult to remove" considered improper); *DA, Fort Sill, Oklahoma*, 29 FLRA 1110 (1987) (photograph of union officials with Army and White House representatives during contested election improper).
2. The test for determining whether an action or statement by a management official violated neutrality is whether, under the circumstances of the case, the agency's conduct may reasonably tend to coerce or intimidate an employee or whether an employee could reasonably have drawn a coercive inference from an agency statement. *Arizona Air National Guard and AFGE Local 2924*, 18 FLRA 583 (1985).
3. Management may act and speak in some instances. 5 U.S.C. § 7116(e).
 - a. Publicize election and encourage employees to vote.
 - b. Correct the record.
 - c. Inform employees about Government policy concerning labor-management relations.

VI. SCOPE OF COLLECTIVE BARGAINING.

A. Philosophy.

1. 5 U.S.C. § 7114(a)(4) provides that the ". . . agency and any exclusive representative in any appropriate unit in the agency, through appropriate representatives, shall meet and negotiate in good faith for the purpose of arriving at a collective bargaining agreement. In addition, the agency and the exclusive representative may determine

appropriate techniques, consistent with the provisions of section 7119 of this title, to assist any negotiation."

2. The refusal to negotiate in good faith is an ULP.
 - a. Management. 5 U.S.C. § 7116(a)(5).
 - b. Union. 5 U.S.C. § 7116(b)(5).
- B. Bargaining in good faith includes the obligations to:
 1. Approach the negotiations with a sincere resolve to reach a collective bargaining agreement. 5 U.S.C. § 7114(b)(1).
 2. Be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment. 5 U.S.C. § 7114(b)(2).
 3. Meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays. 5 U.S.C. § 7114(b)(3). *AAFES McClellan Base Exchange, McClellan Air Force Base, California and AFGE Local 1857*, 35 FLRA 764 (1990); *Department of the Army, Lexington Bluegrass Army Depot, Lexington, Kentucky, v. Local 894 AFGE, AFL-CIO*, 89 FSIP 143 (1990).
 4. Furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data which is normally maintained by the agency in the regular course of business; which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining. 5 U.S.C. § 7114(b)(4).
 - a. To the extent not prohibited by law. This applies mainly to Privacy Act concerns.
 - b. The Privacy Act applies to all union requests for information. *FAA, New York TRACON, Westbury, NY and National Air Traffic Controllers Association*, 50 FLRA 338 (1995); *United States Department of Defense v. FLRA*, 510 U.S. 487 (1994).
 - c. If sanitized information will serve the purpose and protect Privacy Act concerns, that information must be provided. *Department of Justice, Immigration and Naturalization Service*,

Northern Region, Twin Cities, Minnesota v. FLRA, 144 F.3d 90 (D.C. Cir. 1998) (The agency violated the statute by failing to provide the union with copies of sanitized disciplinary action taken against employees similarly situated with the bargaining unit employee that the union was representing).

d. Reasonably Available.

- (1) Request cannot be excessive or outrageous, *DOJ v. FLRA*, 991 F.2d 285 (5th Cir. 1993), or available only through "extreme or excessive means." *Social Security Administration and AFGE Local 3302*, 36 FLRA 943 (1990).
- (2) Destroying requested information can be a ULP. *SSA, Dallas and AFGE, AFL-CIO, Local 1336*, 51 FLRA 1219, 1224-1226 (1996).
- (3) Failure to inform union that information no longer exists is an unfair labor practice. *SSA, Dallas and AFGE, AFL-CIO, Local 1336*, 51 FLRA 1219, 1226-1227 (1996).
- (4) Failure to provide the information in a timely manner is an unfair labor practice.

e. Necessary.

- (1) The union must show a "particularized need" for the information. This is a link between the information sought and the duties of representation. *IRS, Kansas City and NTEU*, 50 FLRA 661 (1995)
- (2) To make a showing of particularized need, a union must articulate specifically why it needs the information and how it intends to use the information. It must establish a connection between the requested information and its representational duties. *Federal Bureau of Prisons, FCI Fort Dix, N.J.*, 64 FLRA 106 (2009); *Internal Revenue Service, Kansas City*, 50 FLRA 661 (1995).
- (3) When an agency makes a reasonable request for additional justification for information requested, the union must provide explanations that extend beyond mere conclusions. If the union fails to respond to an agency's request for an explanation of particularized

need, the FLRA will not find an apparent need for some of the information. *Kirtland AFB and AFGE Local 2263*, 60 FLRA 791 (2005).

- (4) A particularized need statement need not be so specific as to require a union to reveal its strategy or the identity of potential grievant. *Internal Revenue Service, Kansas City and NTEU*, 50 FLRA 661 (1995).

f. The agency's statutory duty to furnish information extends to the full range of representational activity, not just in the context of pending negotiations between labor and management. *FAA and National Air Traffic Controllers*, 55 FLRA 254 (1999).

5. If an agreement is reached, to execute on the request of any party to the negotiation a written document embodying the agreed terms, and to take such steps as are necessary to implement such agreement. 5 U.S.C. § 7114(b)(5).

C. When to Bargain.

1. Contract: Management must negotiate with a new exclusive representative at the inception of a new contract and before renewal of an existing contract.
2. Mid-Contract: When appropriate, management must continue to negotiate during the life of the contract.
 - a. Either party may refuse to bargain over issues covered by the CBA. *Health and Human Services and AFGE*, 47 FLRA 1004 (1993). This is referred to as the "Covered by Doctrine." In assessing whether a matter is "covered by" a collective bargaining agreement, the Authority applies a two-pronged test (*Internal Revenue Service, National Distribution Center, Bloomington, Ill.*, 64 FLRA 586 (2010)):
 - b. Under the first prong, the Authority assesses whether the subject matter is "expressly contained in" the collective bargaining agreement. *United States Dep't of HHS, SSA, Balt., Md.*, 47 FLRA 1004 (1993).
 - c. If the subject matter is not expressly contained in the agreement, then the Authority applies the second prong of

the analysis. Under the second prong, the Authority examines whether the matter is "inseparably bound up with and ... thus [is] plainly an aspect of ... a subject expressly covered by the contract."

- d. Both sides must negotiate over management-initiated midterm proposals.
- e. Union's right to initiate midterm bargaining.
 - (1) Depends on statutory interpretation by the FLRA. *See NFFE, Local 1309, v. Dep't of the Interior*, 119 S. Ct. 1003 (1999) (in reversing a lower court holding that the statutory duty to bargain does not include midterm bargaining (or bargaining about midterm bargaining), the Supreme Court held that the Federal Labor Relations Authority has the legal power to determine whether the parties must engage in midterm bargaining (or bargaining about that matter)).
 - (2) Unions have a statutory right to initiate midterm bargaining. *Department of the Interior and NFFE, Local 1309*, 56 FLRA 45 (2000) (concluding that an agency must bargain over a proposal that obligates it to bargain over midterm issues not covered by the CBA).
 - (3) Midterm bargaining is only required with the exclusive representative. *AFGE, Local 2366, AFL-CIO v. FLRA*, 114 F.3d 1214 (D.C. Cir. 1997) (it is not an ULP to refuse to engage in midterm bargaining with the local union when the existing agreement with the local union has expired but is being continued by operation of law, and the national union is the exclusive representative by default).

D. What to Bargain.

- 1. Conditions of Employment Are Negotiable. 5 U.S.C. § 7102(2).
 - a. "Conditions of employment" means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions. 5 U.S.C. § 7103(a)(14).
 - b. Conditions of employment do not include policies, practices, and matters:
 - (1) relating to political activities prohibited under subchapter

III of chapter 73;

- (2) relating to the classification of any position; or
- (3) are specifically provided for by Federal statute.

- c. In determining whether a proposal concerns a condition of employment, the Authority applies the two-prong test under *Antilles Consolidated Education Assoc. and Antilles Consolidated School System*, 22 FLRA 235 (1986). Under this test, the Authority determines: (1) whether the proposal pertains to bargaining unit employees; and (2) whether the record establishes that there is a direct connection between the proposal and the work situation or employment relationship of bargaining unit employees.
- d. Examples of "Conditions of Employment".
 - (1) Wages and Benefits. *Fort Stewart Schools v. FLRA*, 110 S.Ct. 2043 (1990) (proposal concerning mileage reimbursement for teachers negotiable); *Department of the Army v. FLRA*, 914 F.2d 1291 (9th Cir. 1990) (proposals for holiday and disability insurance for NAFI employees negotiable).
 - (2) Amount charged for food served in agency cafeteria. *Marine Corps Logistics Base, Barstow and AFGE Local 1482*, 46 FLRA 782 (1992) (price of soda in vending machines negotiable); *Department of Veterans Affairs and NAGE*, 44 FLRA 162 (1992) (price of food in cafeteria negotiable).
 - (3) Removal of vending machines and microwave oven from break area. *Department of Veterans Affairs and NAGE*, 44 FLRA 179 (1992) (movement of good vending machines to another location was negotiable).
 - (4) Subscription to the Federal Times Newspaper. *SSA and AFGE*, 37 FLRA 880 (1990) (termination of office copy of newspaper was negotiable).
 - (5) Office with a view. *Pension Benefit Guaranty Corp.*, 59 FLRA 48 (2003); *NFFE and EPA*, 39 FLRA 291 (1991).

(6) Childcare. Matters pertaining to day care facilities concern conditions of employment of unit employees. *Gen. Serv. Admin., Region 10, Auburn, Wash. and AFGE*, 47 FLRA 585 (1993).

(7) Past Practices: Bargaining is required to change clear, consistent, long-standing policies that are known about and accepted by both parties. *Social Security Administration and AFGE, Local 1336*, 9 FLRA 229 (1981).

e. Examples of items not found to be "Conditions of Employment."

(1) Matters concerning individuals not in the bargaining unit. *AFGE v. FLRA*, 110 F.3d 810 (D.C. Cir. 1997) (a proposal which directly implicates or purports to regulate supervisors' conditions of employment by redefining RIF competitive areas which included supervisors, was outside of the duty to bargain because supervisors are not members of the bargaining unit); *ACT and State of New York, Division of Military and Naval Affairs*, 11 FLRA 475 (1983) (proposal concerning filling military positions not negotiable); *NAGE Local 2272 and Scott AFB*, 7 FLRA 710 (1982) (proposal concerning discipline of managers and supervisors not negotiable).

(2) Use of recreational facilities while on off-duty status was not negotiable. *NAGE, Local R5-168 and DA*, 19 FLRA 552 (1985).

(3) Proposal that Agency will forgive an outstanding debt owed to it by a NAFI was not negotiable. *IFPTE and Dep't of Navy*, 44 FLRA 302 (1992).

f. Proposal must rise to the level that creates a bargaining obligation. *GSA Region 9 and NFFE Local 81*, 52 FLRA 1107 (1997) (agency was not required to bargain over temporarily relocating a BU employee from one building to another because the effect was de minimis); *HHS and AFGE*, 24 FLRA 403 (1986) (change in employee's title, but not duties, did not create a duty to bargain).

2. Topics Precluded From Negotiation by Statute.

a. Proposals That Conflict With Any Federal Statute Are Not Negotiable. *AFGE, Local 1547 and 56th Fighter Wing*,

Luke Air Force Base, 55 FLRA 684 (1999) (union proposal that required agency to spend appropriated funds for motorcycle safety equipment found to be outside the duty to bargain because it violated federal statute); *GSA v. FLRA*, 86 F.3d 1185 (D.C. Cir., 1997) (determination of whether GSA police officers could legally carry firearms home between shifts under the authorizing statute was a matter for the Administrator to decide, not the FLRA).

- b. Proposals That Conflict With Government-Wide Rules or Regulations (also referred to as "outside agency" regulations) Are Not Negotiable. 5 U.S.C. § 7117(a)(2) and (3).
 - (1) What are Government-Wide Regulations? Regulations and official declarations of policy that apply to the Federal civilian workforce as a whole and are binding on the Federal agencies and officials to which they apply. *Defense Contract Audit Agency, Central Region and AFGE*, 47 FLRA 512, 521 (1993).
 - (2) Notice of government-wide regulations that conflict with CBA. *Fort Hood and AFGE*, 40 FLRA 636 (1991) (notice required before change in government-wide regulation is included in automatically reviewed contract).
- c. Proposals That Conflict With Agency Regulations
 - (1) Procedures. 5 C.F.R. Part 2424. Proper forum to address the question is negotiability proceedings, not ULP hearing. *FLRA v. Aberdeen Proving Ground*, 485 U.S. 409 (1988) (agency refused to bargain alleging compelling need, no ULP).
 - (2) There is a duty to bargain in good faith, agency rules and regulations that are not inconsistent with Federal law or any government wide regulation, when the Authority has determined that no compelling need exists for the rule or regulation. 5 U.S.C. § 7117.
 - (3) Compelling need criteria. 5 C.F.R. § 2424.50; *Ass'n of Civilian Technicians Montana Air Chapter No. 29 and National Guard Bureau*, 56 FLRA 674 (2000) (concluding that the National Guard did not establish a compelling need for its regulation and ordering it to bargain over the union's proposals); *NTEU and FDIC*, 14 FLRA 179 (1984) (union

proposal about when members can take compensatory time was negotiable because no compelling need).

- (a) The rule or regulation is essential to the accomplishment of the mission of the agency.
 - (b) The rule or regulation is necessary to insure the maintenance of basic merit principles.
 - (c) The rule or regulation implements a mandate to the agency under law or outside authority, which is essentially nondiscretionary in nature.
- d. Matters Contrary to Statutory Management Rights Are Not Negotiable; however, Exclusive Representatives are entitled to negotiate the procedures which management officials will observe in exercising a management right or appropriate arrangements for employees adversely affected by the exercise a management right. 5 U.S.C. §§ 7106(a) and 7106(b).
- (1) On 14 December 2009, President Obama issued Executive Order 13522, Creating Labor-Management Forums to Improve Delivery of Government Services. Requires Agency heads, to the extent permitted by law:
 - (a) allow employees and their union representatives to have pre-decisional involvement in all workplace matters to the fullest extent practicable, without regard to whether those matters are negotiable subjects of bargaining under 5 U.S.C. § 7106;
 - (b) provide adequate information on such matters expeditiously to union representatives where not prohibited by law; and
 - (c) make a good-faith attempt to resolve issues concerning proposed changes in conditions of employment, including those involving the subjects set forth in 5 U.S.C. § 7106 (b)(1).
 - (2) Mission, budget, organization, numbers of employees, and internal security practices. 5 U.S.C. § 7106(a)(1).
 - (a) Mission. *NLRB Local 21 and NLRB*, 36 FLRA 82 (1990) (hours when open to public not negotiable);

AFLC, Wright Patterson, AFB, 2 FLRA 603 (1980) (what topics would be taught was not negotiable).

- (b) Budget. *NTEU and NRC*, 47 FLRA 95 (1993) (pay increase proposal had significant cost, minimal benefit, and was not negotiable).
 - (i) Does proposal require agency to include specific programs, operations, or specific amounts allocated to specific programs, or
 - (ii) Would proposal lead to significant increased costs that are:
 - (a) Significant,
 - (b) Unavoidable, and
 - (c) Not offset by compensating benefits?
- (c) Organization. *NAGE and U.S. Dep't of Veterans Affairs, Johnson Medical Center*, 55 FLRA 679 (1999) (union proposal that delayed agency from fully implementing its reorganization not negotiable); *ACT, Pennsylvania State Council and Adjutant General of Pennsylvania*, 29 FLRA 1292 (1987) (union proposed rules for affiliation of military technicians not negotiable); *CREA and Library of Congress*, 3 FLRA 736 (1980) (union proposal to create four sections in division not negotiable).
- (d) Number of employees. *DoD, Defense Mapping Agency and NFFE*, 46 FLRA 298 (1992) (program for employees who lose security clearance not negotiable); *NTEU Chapter 83 and IRS*, 35 FLRA 398 (1990) (union proposal that employees being relocated have 64 feet of contiguous workspace was negotiable).
- (e) Internal security practices. *FOP and DVA Providence Medical Center*, 51 FLRA 143 (1995) (proposal that agency continue to assign guards to fixed schedule not negotiable); *U.S. Air Force Academy*, 46 FLRA 199 (1992) (union proposal allowing radar detectors for "safety" not

negotiable); *NTEU and Bureau of Engraving and Printing*, 18 FLRA 405 (1985) (union proposal limiting searches not negotiable).

- (3) In accordance with applicable laws -- to hire, assign, direct, layoff, and retain employees; or to suspend, remove, reduce in grade or pay, or to take disciplinary action against such employees. 5 U.S.C. § 7106(a)(2)(A).
- (a) "In accordance with applicable laws. . . ." There is no management right to violate the law. *AFGE and HHS*, 44 FLRA 1405 (1992) (finding that Title VII, prohibiting discrimination, is an "applicable law"); *IRS and FLRA*, 42 FLRA 377 (1991) (finding that the term "applicable laws" in § 7106(a)(2) of the Statute included rules, regulations and other agency pronouncements having the force and effect of law and that OMB Circular A-76 is a regulation that has the force and effect of law).
- (b) To hire. *AFGE Local 3354 and U.S. Dep't of Agriculture Farm Services Agency, Kansas City*, 54 FLRA 807 (1998) (the decision whether to fill vacant positions is encompassed within the agency's right to hire).
- (c) To assign employees. *AFGE Local 1712 and Alaska Civilian Personnel Advisory Center, Fort Richardson, Alaska*, 62 FLRA 15 (2007) (the right to determine the methods used to evaluate and supervise employees is included in management's right to assign and direct employees); *AFGE Local 3354 and U.S. Dep't of Agriculture Farm Services Agency, Kansas City*, 54 FLRA 807 (1998) (the decision whether to fill vacant positions is encompassed within the agency's right to assign employees); *AFGE Local 695 and Denver Mint*, 3 FLRA 43 (1980) (union proposals concerning rotation of work assignments was not negotiable).
- (d) To assign employees: Official time.
- (i) Proposal that official time for union work, "normally will be granted if no substantial workload disruption would result," was found negotiable because of the official time

provision of the Statute. *NTEU and BATF*, 45 FLRA 339 (1992).

- (ii) An Agency did not commit an unfair labor practice when it required an employee to adhere to formal official time procedures negotiated by the parties in their collective bargaining agreement without first notifying and bargaining with the union in light of the employee's apparent abuse of the informal official time procedures. *Department of Air Force, 6th Support Group, MacDill Air Force Base, and NFFE Local 153*, 55 FLRA 146 (1999).
 - (iii) The anti-lobbying provisions contained in DoD Appropriations would not allow DoD unions to, on official time, lobby Congress on pending legislation. *North Carolina National Guard*, 55 FLRA 811 (1999). However, a union proposal to permit official time to lobby Congress on desired legislation was not contrary to the appropriations statute. *Association of Civilian Technicians and Arkansas National Guard*, 56 FLRA 427 (2000).
 - (iv) Union officials are not precluded from using official time to speak, meet, or correspond with congressional personnel for those issues that are unrelated to any legislation or appropriation matters pending before Congress should management and the unions agree to such language.
- (e) To direct employees. Performance standards are non-negotiable. *AFGE v. FLRA*, 691 F.2d 565 (D.C. Cir. 1982) (union proposal requiring employee participation in establishing performance standards was not negotiable), *cert. denied*, 461 U.S. 926 (1983).
 - (f) To layoff and retain employees. *Defense Distribution Depot, Susquehanna, PA.*, 56 FLRA 660 (2000) (decision to conduct a RIF and to decide which positions to retain are management rights).

- (g) To suspend, remove, reduce in pay grade or pay, or take other disciplinary action. *Naval Aviation Depot, Cherry Point, N.C.*, 36 FLRA 28 (1990) (proposals which limit an agency's discretion to determine an appropriate disciplinary penalty to a minimum penalty are outside the duty to bargain because they directly interfere with management's right to discipline).
- (4) To assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted. 5 U.S.C. § 7106(a)(2)(B).
 - (a) To assign work. *AFGE Local 3392 and GPO*, 52 FLRA 141 (1996) (union proposal that certain work would be done by supervisor was not negotiable); *AFGE and Department of Labor*, 26 FLRA 273 (1987) (union proposal that only physicians can examine certain records was not negotiable).
 - (b) Authority precedent holds that seniority-based assignments are within the duty to bargain and enforceable if the agency retains the right to determine employee qualifications and seniority is applied only to equally qualified employees. *See AFGE, Local 1164*, 60 FLRA 785, 787 (2005); *AFGE, Local 1138, Council 214*, 51 FLRA 1725, 1731 (1996); *AFGE, AFL-CIO, Local 987*, 35 FLRA 265 (1990).
 - (c) To contract out.
 - (i) Decision to contract out. *AFGE v. Brown*, 680 F.2d 722 (11th Cir. 1982), *cert. denied*, 103 U.S. 728 (1983) (decision to contract out base operations is a management right).
 - (ii) OMB Circular A-76 as a government-wide regulation. *IRS v. FLRA*, 996 F.2d 1246 (D.C. Cir. 1993) (court ruled OMB Circular A-76 provision concerning appeals was government-wide regulation precluding negotiation).

- (d) To determine the personnel by whom the agency operations shall be conducted. *Bremerhaven Metal Trades Council and Naval Supply Center Puget Sound*, 32 FLRA 643 (1988) (union proposals limiting who could be assigned to work particular jobs were not negotiable).
 - (5) Filling positions by promotions and appointments. 5 U.S.C. § 7106(a)(2)(C). *NFFE, Local 1745 v. FLRA*, 828 F.2d 834 (D.C. Cir. 1987) (proposal for union membership on rating and ranking panels was not negotiable); *ACT, N.Y. State Council and New York, Div. of Military and Naval Affairs*, 11 FLRA 475 (1983) (proposals requiring the agency to select a technician for a trainee position is inconsistent with management's right to make selections for appointments from any appropriate source).
 - (6) Emergency actions. 5 U.S.C. § 7106(a)(2)(D). *Army Corps of Engineers, St. Louis District, Mo.*, 55 FLRA 243 (1999) (a union proposal to define "emergency" is not nonnegotiable).
3. Permissive/Optional Areas of Negotiation. 5 U.S.C. § 7106(b)(1). An agency may elect to negotiate the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work
- a. Executive Order 13522 requires agencies to make a good-faith attempt to resolve issues concerning proposed changes in conditions of employment, including those permissive topics enumerated in 5 U.S.C. § 7106 (b)(1).
 - b. The Numbers, Types, and Grades of Employees or Positions Assigned to any Organizational Subdivision, Work Project, or Tour of Duty (commonly called "Staffing Patterns"). *NFFE Local 2148 and U.S. Department of the Interior, Office of Surface Mining, Albuquerque, NM*, 53 FLRA 427 (1997) (proposals seeking to add positions and fill vacancies concern staffing patterns and are negotiable at the election of the agency).
 - (1) "Numbers of Employees or Positions" refers to a specific number of employees or positions that management proposes to assign to a specific organizational subdivision, work project, or tour of duty.

- (a) Work-hour changes relate to tours of duty and are permissive. *NAGE Local R5-184 and Veterans Affairs Medical Center, Lexington*, 51 FLRA 386 (1995) (proposal to extend part-time dental assistant hours found to concern numbers of employees assigned to a tour of duty); *Scott AFB and FLRA*, 33 FLRA 532 (1988) (agency change of tour for battery shop worker found permissive topic).
 - (b) A proposal requiring an agency to fill an existing vacant position at an organizational subdivision concerns the number of employees assigned to that subdivision because such a proposal would effectively increase the number of employees assigned to the organizational subdivision. *NAGE, Local R5-184 and Veteran's Affairs*, 55 FLRA 549 (1999) (finding that a proposal requiring a bilateral agreement concerning the number of employees or positions to be assigned is within the scope of § 7106(b)(1) regardless of whether the proposal would increase, decrease, or maintain the number that the agency proposes to assign); *AFGE Local 3354 and U.S. Dep't of Agriculture Farm Services Agency, Kansas City*, 54 FLRA 807 (1998).
 - (c) The number of employees necessary to have on duty for a specific shift is a permissive topic relating to the number of employees assigned to a tour of duty. *AFGE, Local 2145 and Veterans Affairs*, 48 FLRA 53 (1993).
- (2) "Types of Employees or Positions" refers to management's right to make determinations based on work or job-related differences between employees assigned to perform certain work in organizational subdivisions, on work projects or tours of duty.
- (a) "Types" refers to distinguishable classes, kinds, groups or categories of employees or positions that are relevant to the establishment of staffing patterns. *NAGE, Local R5-184 and Veteran's Affairs*, 55 FLRA 549 (1999) (ruling that licensed practical nurse positions are a "type" of position within the meaning of permissive topics).
 - (b) Proposals that assign particular duties to specific

employees do not encompass “type” of employees or positions. *AFGE, Local 3529 and DoD, DCAA, Central Region*, 47 FLRA 512 (1993).

- (c) Bridge positions are types of positions since bridge positions have different job requirements, such as experience or qualifications, than regular positions in the same job series. *AFGE, Local 1293 and HHS*, 44 FLRA 1405 (1992).
- (3) Grades of Employees or Positions. While the Authority has not given a specific definition of this area, a general understanding is possible by looking at what is *not* “grades of employees or positions.”
- (a) The grade levels for specific employees or positions. The Statute sets this outside the duty to bargain because it deals with classification of positions. The classification of jobs is specifically excluded from the definition of “conditions of employment.” 5 U.S.C. § 7103(a)(14). Therefore, any proposals concerning the classifications of jobs are outside of the duty to bargain. *AFGE, Local 1978 and Dep’t of Interior*, 51 FLRA 637 (1995).
 - (b) The title, job series, and grade of a position are the essence of the classification of a position. However, this does not make negotiable a union proposal that simply requires a position or employee of a certain grade to be assigned to an organizational subdivision, work project, or tour of duty.
 - (c) Once the agency has determined the classification and grade level structure of employees and positions in the organization, the agency may choose to negotiate over which employees or positions, identified by previously established grade, are assigned to subdivisions, work projects, or tours of duty in the organization. *NAGE, Local R1-109 and Dep’t Of Veterans Affairs*, 38 FLRA 211 (1990).
- (4) An “Organizational Subdivision” is a section of an agency that will perform a specific agency function, and where employees performing that function will be assigned.

NAGE, Local R14-23 and DoD Commissary Agency, 54 FLRA 1302 (1998).

(5) A “Tour of Duty” is the hours of a day (a daily tour of duty) and the days of an administrative workweek (a weekly tour of duty) that constitute an employee’s regularly scheduled workweek. *AFGE, Local 2366 and Department of Justice, INS, 47 FLRA 225 (1993); NAGE, Local R7-23 and Department of Air Force, Scott Air Force Base, 33 FLRA 532 (1988). See also 5 CFR § 610.102(h).*

(6) A “Work Project” has been defined as a particular job or task. *AFGE, Local 1345 and Department of Army, Fort Carson, 48 FLRA 168 (1993)* (the union submitted a proposal requiring the assignment of at least two employees when work is performed in enclosed areas. The Authority ruled that it concerned numbers of employees assigned to a work project).

c. Technology, Methods and Means of Performing Work.

(1) The Authority has defined “technology” as the technical method to be used in accomplishing or furthering the performance of the agency’s work. *AFGE, NBPC, Local 2544 and Justice, INS, 46 FLRA 930 (1992)* (union proposal that each employee be provided a computer terminal at his/her workstation concerned the technology and means of performing work); *AFGE, AFSM and CREA and The Library of Congress, 7 FLRA 578 (1982).*

(2) “Means” is defined as any instrumentality including any agent, tool, device, measure, plan or policy used by the agency for accomplishing or furthering the performance of its work. *AFGE, NBPC, Local 2544 and Justice, INS, 46 FLRA 930 (1992); AFGE and SSA, 11 FLRA 576 (1983)* (union proposal that all examiners have a phone on their desk was a permissive topic); *But see AFGE Council 236 and GSA, 55 FLRA 449 (1999)* (proposals concerning the number and designation of rating levels do not concern how an agency performs its work or what an agency uses to accomplish its work; rather, such proposals concern how an agency evaluates the way employees perform the work to which they have been assigned and therefore impermissibly affect management’s right to direct employees and assign work).

- d. The Rule: The rights set forth in § 7106(b)(1) of the Statute are outside the mandatory scope of bargaining, although management may elect to bargain over these subjects. *U.S. Department of Commerce, Patent and Trademark Office and Patent Office Professional Association*, 54 FLRA 360 (1998) (Member Wasserman dissenting in part), *petition for review filed sub nom.*
- (1) Management may begin to negotiate the proposal, then declare it non-negotiable. *National Park Service*, 24 FLRA 56 (1986) (union proposal requiring help or mechanical aides for lifting heavy objects a permissive topic).
 - (2) Once agreement is reached, proposal under § 7106(b)(1) may not be declared non-negotiable. *National Park Service*, 24 FLRA 56 (1986) (agreement could not be declared non-negotiable at agency head review).
 - (3) If the parties disagree over whether a proposal is a permissive topic or a management right not subject to negotiation, the FLRA will first determine whether a proposal is within the duty to bargain, and then, if necessary, address claims that would determine whether a proposal is electively negotiable. *AFGE, Local 222 and HUD*, 54 FLRA 171 (1998).
4. Interaction between Management Rights (§ 7106(a)) and Permissive Topics (§ 7106(b)(1)). *NAGE and DVA Medical Center, Lexington, Kentucky*, 51 FLRA 386 (1995) (finding that permissive topics § 7106(b)(1) are exceptions to the management rights under § 7106(a)).
- a. The Authority first determines if the proposal concerns matters under § 7106(b)(1). If it does, the complaint will be dismissed UP 5 C.F.R. § 2424.10(b) (noting that the duty to bargain is at the election of the Agency).
 - b. If the proposal does not concern matters under § 7106(b)(1), the Authority will then analyze the proposal under § 7106(a).
 - c. If the proposal concerns matters that are governed by both § 7106(a) and § 7106(b)(1), and the proposal's provisions or requirements are inseparable, the Authority will determine which of the proposal's requirements is dominant. Negotiability is determined based on the dominant requirement. *AFGE, Local 1336 and SSA, Mid-America Program Service Center*, 52 FLRA 794 (1996) (the dominant requirement is that which the other

requirements addressed by the proposal depend for their viability).

- d. Once agreement is reached on a proposal that is both a prohibited topic of negotiation under § 7106(a) and a permissive topic under § 7106(b), the rules governing permissive topics will control and the proposal may not be declared non-negotiable. *Assoc. of Civilian Technicians, Montana Air Chapter No. 27 v. FLRA*, 22 F.3d 1150 (D.C. Cir. 1994) (negotiations over requirement civilian technicians wear uniforms).

5. Impact and Implementation Bargaining. 5 U.S.C. §§ 7106(b)(2) and (3).

- a. Management Must Usually Negotiate "Impact and Implementation" of a Non-negotiable Management Right Decision. 5 U.S.C. § 7106(b)(2) & (3).

- (1) Procedures to be utilized in exercising a management right.
- (2) To lessen the impact on employees adversely affected by the exercise of management rights.

- b. The "Impact" area of negotiation -- Proposals Concerning "Arrangements."

- (1) Union proposals concerning appropriate arrangements for employees adversely affected by the exercise of management rights under § 7106(a) are negotiable. 5 U.S.C. § 7106(b)(3).
- (2) The arrangement must reduce the impact of the adverse effects of the exercise of a management right. *United States Department of the Treasury, Office of the Chief Counsel, Internal Revenue Service v. FLRA*, 960 F.2d 1068, 1073 (D.C. Cir. 1992); *American Federation of Government Employees, Local 1900 and U.S. Department of the Army, Headquarters, Forces Command Fort McPherson, Georgia*, 51 FLRA 133, 141 (1995) (a provision that addresses an adverse effect that results from the denial of a negotiated benefit - rather than the exercise of a management right - is not an arrangement).

- (a) There must be a clearly articulated adverse effect. *IRS v. FLRA*, 960 F.2d 1068 (D.C. Cir. 1992) (proposals to prevent management from making temporary details for less than one pay period to

avoid contractual benefits was not negotiable); *NTEU and IRS*, 45 FLRA 1256 (1992) (Authority's adoption of court's position in *IRS* on remand).

- (b) The proposal must narrowly tailor the arrangement to redress only the employees affected. *Interior Minerals Management Service v. FLRA*, 969 F.2d 1158 (D.C. Cir. 1992) (proposals concerning new drug testing program were not negotiable); *National Association of Government Employees, Local R-14-23 and U.S. Department of Defense, Defense Commissary Agency, Kelly Air Force Base, Texas*, 53 FLRA 1440, 1443-44 (1998); *American Federation of Government Employees, National Border Patrol Council and U.S. Department of Justice, Immigration and Naturalization Service*, 51 FLRA 1308, 1319 (1996) (proposals which concern all employees, not just those adversely affected by the exercise of a management right, are not arrangements).

c. The "Implementation" area of negotiation -- Proposals Concerning "Procedures."

- (1) Union proposals concerning the procedures which management officials will observe in exercising their management rights under § 7106(a) are negotiable. 5 U.S.C. § 7106(b)(2); *DOD v. FLRA*, 659 F.2d 1140 (D.C. Cir. 1981) (proposal that no removals will be effected until all grievances completed was negotiable); *AFGE and AAFES*, 2 FLRA 153 (1979) (union proposal that no employee be removed or suspended before completion of review was negotiable).
- (2) The problem lies in determining which proposals deal with procedures affecting the exercise of a management right and which are substantive infringements on management rights.

- (3) Where the proposals are "purely procedural" the Authority applies the "Acting at All" test.
 - (a) If a proposal prevents management from acting at all, it is not negotiable. *Department of Interior v. FLRA*, 873 F.2d 1505 (D.C. Cir. 1989) (finding that a proposal to delay suspensions for 10 days *does not* bar an agency from suspending an employee and is therefore negotiable); *AFGE and Department of Education*, 36 FLRA 130 (1990) (finding that a proposal to delay adverse action until all appeals have been exhausted which expressly preserved management's right to act immediately in some cases was negotiable).
 - (b) In those cases where the proposal is not as clearly procedural in nature, the Authority applies the "Direct Interference" test: Does the proposal directly interfere with the agency's exercise of a management right? *Aberdeen Proving Ground v. FLRA*, 890 F.2d 467 (D.C. Cir. 1989) (union proposal concerning procedure for establishing legitimate use in drug testing found to be a negotiable procedure).
- d. In *Environmental Protection Agency*, 65 FLRA 113 (2010), the Authority declared that when an agency's exceptions establish that an arbitrator's award affects a management right, the FLRA will decide only whether the agreement provision enforced by the arbitrator and negotiated as an arrangement under 5 USC § 7106(b)(3) "abrogates" the management right. The FLRA no longer will use the excessive interference test to determine whether an arbitrator's award impermissibly interferes with the exercise of a management right

VII. IMPASSE RESOLUTION.

- A. Federal Mediation and Conciliation Service (FMCS). 29 C.F.R. Part 1403. FMCS consists of a Director located in Washington, D.C., and commissioners/mediators located in the FMCS Regional or District offices throughout the country
 1. Notification to Federal Mediation and Conciliation Service.
 - a. Prior to Contract Expiration.

- b. Upon Impasse.
 - 2. Functions of the FMCS.
 - a. Mediation. The FMCS will send a mediator to the installation who will attempt to get the parties to reach agreement. The mediator will meet with both parties, offer recommendations, and send the parties back to the negotiation table to again discuss the matter to try and reach agreement.
 - b. Referral to FSIP. If the parties cannot reach agreement with the assistance of the mediator, the mediator and/or the parties may request the assistance of the Federal Service Impasses Panel (hereinafter referred to as the Panel or FSIP).
- B. Request Assistance of Federal Service Impasses Panel. The FSIP is a suborganization of the Federal Labor Relations Authority, composed of a Chairman and six other members appointed by the President.
 - 1. FSIP Authority. 5 U.S.C. § 7119(b)(5). The Panel shall consider the impasse and shall. . . take whatever action is necessary and not inconsistent with this chapter to resolve the impasse.
 - 2. Issues considered. Impasse issues, not negotiability issues.
 - 3. FSIP's Courses of Action. 5 U.S.C. § 7119(b)(5)(B)(iii); 5 C.F.R. § 2472.11.
 - a. Resumption of Negotiations.
 - b. Resumption of Negotiations with Mediation Assistance.
 - c. Make Recommendations.
 - d. Make a Decision and Order.
 - e. Authorize or Direct Mediation or Arbitration.
 - f. Final-Offer Selection.
- C. No Direct Appeal of FSIP Decision to FLRA. *Council on Prison Locals v. Brewer*, 735 F.2d 1497 (D.C. Cir. 1984) (union petition for review of allegedly illegal FSIP decision review was found to be precluded absent extraordinary circumstances); *New York National Guard*, 2 FLRA 185 (1979) (when agency sought review of FSIP order allowing civilian technicians to wear civilian clothes the Authority held there was no authority for direct appeal).

VIII. REPRESENTATIONAL RIGHTS.

- A. Formal Discussions. An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices, or other general condition of employment . . . 5 U.S.C. § 7114(a)(2)(A).
1. The rule: Management must give the exclusive representative advance notice and an opportunity to be represented at a formal discussion.
 - a. Mere presence of union officials is insufficient; advance notice must be given. *Department of Treasury*, 29 FLRA 610 (1987) (union steward was present and participated in monthly meeting); *McClellan Air Force Base*, 29 FLRA 594 (1987) (JAG, on phone with union when witness arrived, notified union but did not invite union to the discussion).
 - b. Union representative has the right to speak and comment. *Nuclear Regulatory Commission*, 21 FLRA 765 (1986) (ULP when management interrupted union representative whenever he spoke).
 - c. Formality is determined by the totality of the circumstances. Some factors that indicate the level of formality include: where meeting held, how long it lasted, who was present, agenda, and were notes kept.
 2. EEO Matters
 - a. *Dep't of the Air Force, 436th Airlift Wing, Dover Air Force Base, Dover, Del. & AFGE*, 57 FLRA 304 (2001) The Authority held that an agency's meeting with a bargaining unit employee held for the purpose of mediating an employee's formal EEO complaint was a "formal discussion" pursuant to § 7114(a)(2)(A). Relying on its decision in *Luke*, the Authority declined to acquiesce in the Ninth Circuit's decision. 316 F.3d 280 (C.A.D.C. 2003) (petition for review denied; application for enforcement granted).
 - b. *U.S. Dep't of Energy, Rocky Flats Field Office, Golden, Colo. And AFGE*, 57 FLRA 754 (2002) The Authority found, based upon the totality of the circumstances, that impromptu and employee-initiated meetings to discuss settlement of the employee's EEO complaint were not "formal discussions" pursuant to § 7114(a)(2)(A).

- c. In *Davis-Monthan Air Force Base*, 64 FLRA 845 (FLRA 2010), the Authority found the Agency committed a ULP when it honored an employee's request that the union not be present at an EEO mediation session since there was no evidence that the union's presence was in direct conflict with an employee's right.
- B. Investigatory Examinations. *An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at any examination of an employee in the unit by a representative of the agency in connection with an investigation if (i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and (ii) the employee requests representation.* 5 U.S.C. § 7114(a)(2)(B).
 1. *NLRB v. Weingarten*, 420 U.S. 251 (1975) (NLRB case where employee being interrogated about a theft asked for a union representative and the representative was denied). See also *U.S. Department of Justice, Fed. Bureau of Prisons, Office of Internal Affairs, Washington, D.C. and AFGE, Council of Prison Locals*, 55 FLRA 388 (1999) (holding that a bargaining unit employee's statement, "I want somebody to talk to" was sufficient to put the agency on notice that the employee desired representation).
 2. Management Options.
 - a. Allow representative to attend,
 - b. End the interview, or
 - c. Give employee the option of either answering the questions without a union representative or having no interview at all. *Bureau of Prisons, Leavenworth*, 46 FLRA 820 (1992) (Office of Inspector General investigator gave employee being interrogated the choice of remaining silent or proceeding without a union representative).
 3. Employees must be reminded of their rights under this section annually. 5 U.S.C. § 7114(a)(4). *Sears v. Dept. of Navy*, 680 F.2d 863 (1st Cir. 1982) (the Navy did not need to give additional notice where they provided annual notice).
 4. Inspectors General are agency representatives when they conduct an employee examination covered by § 7114(a).
 - a. *NASA v. FLRA*, 119 S. Ct. 1979 (1999) (finding that while Congress intended that OIGs would enjoy a great deal of autonomy, the OIG investigative office still performs on behalf of the particular agency in which it is stationed and therefore acts as an agency representative when it conducts examinations covered by §7114(a)).

- b. *U.S. Department of Justice, Washington, D.C. & Office of the Inspector General and AFGE, Local 709; U.S. Department of Justice, Washington, D.C. & Office of the Inspector General and AFGE, 56 FLRA 556 (2000) (finding that agency IGs who interviewed bargaining unit employees were acting as representatives of the agency notwithstanding the fact that the investigative interviews were part of a criminal, rather than administrative, investigation).*
 - 5. *See Federal Bureau of Prisons, Office Of Internal Affairs, Washington, D.C. and Fed. Bureau of Prisons, Fed. Correctional Inst. Englewood, Littleton, Colo. and AFGE, Local 709, AFL-CIO, 54 FLRA 1502 (1998) (stating that, upon a showing of “special circumstances,” an agency is entitled to preclude a particular individual from serving as a designated representative during an investigative interview).*
- C. Fact-Gathering Sessions and Brookhaven Warnings.
 - 1. A “fact-gathering session” is an interview between an agency representative and a bargaining unit employee to ascertain necessary facts in preparation for third party proceedings.
 - 2. Brookhaven Warnings. *Internal Revenue Service and Brookhaven Service Center, 9 FLRA 930 (1982).*
 - a. Management must:
 - (1) inform the employee who is to be questioned of the purpose of the questioning;
 - (2) assure the employee that no reprisal will take place if he or she refuses; and
 - (3) obtain the employee's participation on a voluntary basis.
 - b. The questioning must occur in a context that is not coercive in nature.
 - c. The questioning must not exceed the scope of the legitimate purpose of the inquiry.
 - 3. Brookhaven warnings must be given even if the discussion is formal and the union has been given advance notice and an opportunity to be present. *Veterans Administration and AFGE, 41 FLRA 1370 (1991).*

4. The warnings must be given at each fact-gathering session.
5. Attorney work product
 - a. In *McClellan Air Force Base, Cal.*, 35 FLRA 594 (1990), the Authority rejected the agency's reliance on attorney work product privilege as a defense to a failure to comply with § 7114(a)(2)(A) and found that, where the formal discussion criteria under that section have been satisfied, unions have a right to be represented during a management attorney's interview of a bargaining unit employee.
 - b. The attorney work product privilege cannot be used to preclude the Union president from attending a meeting with a unit employee who will serve as a witness in arbitration, even when the representative will be the union's advocate at the arbitration. *Customs and Border Protection*, 62 FLRA 241 (2007).

IX. UNFAIR LABOR PRACTICES.

- A. Both Agencies and Unions are Prohibited from Committing ULPs.
 1. Management ULPs. 5 U.S.C. § 7116(a).
 - a. Interference with Basic Employee Rights. 5 U.S.C. § 7116(a)(1) provides that it is an ULP for management "to interfere with, restrain, or coerce any employee in the exercise by the employee of any right which is protected under this Chapter." The primary rights, assured by Title VII, are enumerated in 5 U.S.C. § 7102, "Employees' Rights."
 - b. Discrimination to Encourage or Discourage Union Membership. 5 U.S.C. § 7116(a)(2) provides that it is an ULP for management to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment.
 - c. Improper Assistance to a Labor Organization. 5 U.S.C. § 7116(a)(3) provides that it is an ULP for management to sponsor, control, or otherwise assist any labor organization, other than to furnish, upon request, customary and routine services and facilities if the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status.

- d. Retaliation Against an Employee for Filing a Complaint or Giving Information. 5 U.S.C. § 7116(a)(4) provides that it is an ULP for management to discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, or petition, or has given any information or testimony under this chapter.
- e. Refusal to Negotiate in Good Faith. 5 U.S.C. § 7116(a)(5) provides that it is an ULP for management to refuse to consult or negotiate in good faith with a labor organization as required by this chapter.
- f. Bypassing the Union. A violation also occurs when management makes a unilateral change to conditions of employment, *i.e.*, changes a condition of employment without giving the exclusive representative notice and an opportunity to negotiate.
- g. Refusal to Cooperate at Impasse. 5 U.S.C. § 7116(a)(6) provides that it is a management ULP to fail or refuse to cooperate in impasse procedures and impasse decisions. Under this provision, management must cooperate in the impasse-breaking procedures established under Title VII and must abide by the decisions of the Federal Service Impasses Panel.
- h. Enforcement of Rules in Conflict with CBA. 5 U.S.C. § 7116(a)(7) provides that it is a management ULP to enforce any rule or regulation (other than a rule or regulation implementing § 2302 of this title) which is in conflict with any applicable collective bargaining agreement, if the agreement was in effect before the date the rule or regulation was prescribed.
- i. Otherwise Fail or Refuse to Comply with Provisions of the Statute. "Catch-all" provision. It is an ULP for management to otherwise fail or refuse to comply with any provision of this chapter. This provision allows the FLRA to enforce all of the Statute's provisions through the ULP mechanism. The language was intended to include the failure or refusal on the part of an agency to comply with any order or decision issued by the FLRA, including ULP orders.

2. Management's Defenses to ULPs.

- a. *De Minimis* Changes. *HHS and AFGE*, 24 FLRA 403 (1986) (change of employees title without change in duties was *de minimis*). Regardless of whether the Agency's change involved the exercise of a reserved management right under § 7106, an agency has an obligation to bargain over procedures to implement a decision and appropriate arrangements for unit employees adversely affected by that decision if the resulting change has more than a *de minimis* effect on conditions of employment. The Authority found no duty to bargain and dismissed the complaint. The reduction of reserved parking spaces for ALJs from 6 to 2 was *de minimis*. The D.C. Circuit affirmed the Authority's reasoning.
- b. Dual Motive ULP Cases. Agency must show that it would have taken the same action in the absence of protected activity and that the action was legitimate. *Warner Robins Air Force Base and AFGE Local 987*, 52 FLRA 602 (1996) (denial of temporary promotion for union president not a ULP); *FEMA and AFGE, Local 4060*, 52 FLRA 486 (1996) (Agency failed to establish that its failure to act on union president's request for a personnel action was legitimate).
- c. Wrong Appeal Route.
 - (1) Issues which can be raised under a statutory appeals procedure may not be raised as a ULP. 5 U.S.C. § 7116(d).
 - (2) Except for matters covered by a statutory appeals procedure (5 U.S.C. §§ 4303, 7512 or 2302(b)(1)), other problems involving conditions of employment that are covered by the CBA may be raised by grievance/arbitration or ULP, but not both. 5 U.S.C. § 7116(d).
3. Union ULPs. 5 U.S.C. § 7116(b).
 - a. Interference with Basic Employee Rights.
 - b. Cause the Agency to Discriminate Against an Employee.
 - c. Coerce a Union Member as Punishment, Reprisal, or for the Purpose of Impeding the Member's Work Performance.
 - d. Discriminate in Union Membership Based Upon Race, Color, Creed, National Origin, Sex, Age, Civil Service Status, Political Affiliation, Marital Status, or Handicapping Condition.

- e. Refusal to Negotiate in Good Faith.
- f. Failure to Cooperate at Impasse.
- g. Call or Participate in a Strike or Work Slow Down, or Condone Such Activity.
- h. Otherwise Fail or Refuse to Comply with Provisions of the Statute.

B. ULP Remedies.

1. Cease and desist order. The "cease and desist" order will describe what the wrongdoer has done wrong, along with an assertion that this wrong will not recur. It is posted in the work areas of the bargaining unit employees for a period to be directed by the Authority, normally 60 days.
2. Status quo ante (SQA). The "status quo ante" remedy may order corrective affirmative action, such as back pay or expunging personnel records.
3. Retroactive Bargaining Order (RBO). The "retroactive bargaining order" requires the parties to go back and bargain over the disputed issue as should have been done originally. If the respondent of an unfair labor practice "knew or should have known that its actions constituted a ULP, a RBO may be appropriate."
4. Reinstate employee with backpay.
 - a. Need statutory authority to order backpay. *SSA v. FLRA*, 201 F.3d 465 (D.C. Cir. 2000) (reversing the FLRA determination that employees were entitled to interest on liquidated damages because liquidated damages, awarded employees through arbitration under the Fair Labor Standards Act, were not "pay, allowances, or differentials" within the meaning of the Backpay Act).
 - b. Backpay is limited to six years under the Backpay Act. *See also NTEU and Federal Deposit Ins. Corp.*, 53 FLRA 1469 (1998) (reversing precedent, the FLRA concluded that arbitrators are bound by the SOL set forth in the Fair Labor Standards Act).
5. Order any remedial action necessary to carry out the purposes and policies of the statute.

X. GRIEVANCE/ARBITRATION.

- A. Collective bargaining agreements must provide procedures for the settlement of grievances, including questions of arbitrability. 5 U.S.C. § 7121(a).
- B. Grievance procedures must be (5 U.S.C. § 7121(b)(1):
 - 1. fair and simple;
 - 2. provide for expeditious processing; and
 - 3. shall be subject to binding arbitration.
 - a. Very limited review by the FLRA.
 - b. Grounds for reversal, which are contained in 5 U.S.C. § 7122, are: (1) that an award violates applicable law, rule or regulation; or (2) other grounds similar to those which courts apply in private sector labor-management relations. Arbitrators, however, have wide discretion to fashion their awards, and the Authority rarely reverses an arbitrator's award.
- C. Management and the Union may exclude any matter from the negotiated grievance process. 5 U.S.C. § 7121(a)(2).
- D. Union has the right to be present during the grievance/arbitration hearings.

XI. SUCCESSORSHIP AND ACCRETION.

- A. FLRA's framework for determining how accretion and successorship apply when an agency reorganizes. *AFGE and Navy Fleet and Industrial Supply Center*, 52 FLRA 950 (1997).
 - 1. The first step is to determine if the employees are in a new appropriate bargaining unit.
 - 2. If the employees are in a new appropriate bargaining unit, apply the successorship analysis.
 - 3. If the employees are not in a new appropriate bargaining unit, apply the accretion analysis.

- B. Successorship following reorganization. *Naval Facilities Engineering Service Center, Port Hueneme, California and National Association of Government Employees*, 50 FLRA 363 (1995). The gaining entity is a successor, and the union retains its status as the exclusive representative of the employees who are transferred, when:
1. An entire recognized unit, or portion thereof, is transferred.
 2. The transferred employees are:
 - a. in an appropriate bargaining unit after the transfer, and
 - b. constitute a majority of such employees in such unit.
 3. The gaining entity has substantially the same organizational mission as the losing entity.
 4. The employees are performing substantially the same duties.
 5. No election is necessary to determine representation.
 6. *See also Dep't. of the Navy, Commander, Naval Base, Norfolk, Va. & NAGE, Local R4-1*, 56 FLRA 328 (2000) (Holding that in agency reorganizations where there are competing claims of successorship, the Authority will first evaluate the proposed bargaining units that most fully preserve the status quo.)
- C. Accretion applies when the transferred employees:
1. Are not in an appropriate bargaining unit.
 2. Are functionally and administratively integrated into existing units.
 3. Are appropriate to add to the bargaining unit.
- D. Restructuring existing units.
1. Chain of command reorganization. *Dep't of the Navy, Commander, Naval Base, Norfolk, Va. & NAGE, Local R4-1*, 56 FLRA 328 (2000).
 - a. A change in an agency's chain of command does not, by itself, render an existing unit inappropriate. Rather, the FLRA will evaluate how such a change has affected each of the three criteria for appropriate units, as applied to the existing unit and any proposed, new units.

- b. If an agency reorganizes and there are competing claims of successorship, the FLRA will first evaluate the proposed bargaining units that will most fully preserve the status quo in terms of bargaining unit structure and the relationship of employees to their chosen exclusive representative. If it finds the existing unit continues to be appropriate, the FLRA will not address any petitions that attempt to establish different unit structures.
2. An agreement between unions that would change the structure of existing bargaining units by removing employees from a unit represented by one union to a unit represented by the other is not valid because it interferes with the fundamental right of employees to determine their exclusive representation, and thwarted the Authority's representation process. *NAGE/SEIU, Local 5000, and SEIU and Dep't of Veterans Affairs, Washington, D.C., 52 FLRA 1068 (1997).*

XII. CONCLUSION.

CHAPTER F
Unfair Labor Practices
TABLE OF CONTENTS

I. INTRODUCTION.....	3
II. REFERENCES.....	3
III. MANAGEMENT VIOLATIONS	3
A. INTERFERENCE WITH BASIC EMPLOYEE RIGHTS	3
B. DISCRIMINATION TO ENCOURAGE OR DISCOURAGE UNION MEMBERSHIP.....	3
C. IMPROPER ASSISTANCE TO LABOR ORGANIZATIONS.....	4
D. RETALIATION AGAINST AN EMPLOYEE	4
E. REFUSAL TO NEGOTIATE IN GOOD FAITH.....	4
F. UNILATERAL CHANGES – PAST PRACTICES.....	4
G. BYPASSING THE UNION.....	6
H. FURNISHING DATA.....	7
I. REFUSAL TO COOPERATE AT IMPASSE	7
J. ENFORCEMENT OF RULES IN CONFLICT WITH CBA.....	7
K. OTHERWISE FAIL OR REFUSE TO COMPLY WITH PROVISIONS OF CHAPTER VII.....	7
IV. MANAGEMENT'S DEFENSES TO UNFAIR LABOR PRACTICES	14
A. <i>DE MINIMIS</i> CHANGES	14
B. DUAL MOTIVE ULP CASES	14
C. WRONG APPEAL ROUTE	14
D. DEFENSES - DUTY TO BARGAIN	15
E. DEFENSES - DUTY TO FURNISH REQUESTED INFORMATION	15
F. DEFENSES - FORMAL DISCUSSIONS.....	15
G. DEFENSES - WEINGARTEN RIGHTS	16
V. UNION VIOLATIONS	16
A. INTERFERENCE WITH BASIC EMPLOYEE RIGHTS	16
B. CAUSE AGENCY TO DISCRIMINATE AGAINST AN EMPLOYEE	17
C. COERCE A UNION MEMBER.....	17
D. DISCRIMINATE IN UNION MEMBERSHIP	17
E. REFUSAL TO NEGOTIATE IN GOOD FAITH.....	17
F. REFUSAL TO COOPERATE AT IMPASSE	17
G. CALL OR PARTICIPATE IN A STRIKE OR WORK SLOWDOWN	17
H. PICKETING BY FEDERAL EMPLOYEES.....	17
I. OTHERWISE FAIL OR REFUSE TO COMPLY WITH PROVISIONS OF CHAPTER	17

VI. REMEDIES	18
A. CEASE AND DESIST ORDER	18
B. STATUS QUO ANTE (SQA)	18
C. RETROACTIVE BARGAINING ORDER	18
D. REINSTATE EMPLOYEE WITH BACKPAY	18
E. ANY REMEDIAL ACTION NECESSARY	18
VII. PROCEDURES.....	19
A. RESOLVING ULPS	19
B. THE CHARGE.....	19
C. REGIONAL DIRECTOR'S ACTIONS	21
D. SETTLEMENT JUDGE PROGRAM.....	21
E. PREHEARING CONFERENCE	22
F. HEARING IS CONDUCTED BY ADMINISTRATIVE LAW JUDGE (ALJ).	23
VIII. CONCLUSION.....	23

Administrative and Civil Law Department The Judge Advocate General's Legal Center and School
--

Unfair Labor Practices

I. INTRODUCTION.

II. REFERENCES.

- A. Statutory definition. 5 U.S.C. § 7116. An act or non-act by an employer or union which contravenes a statutory proscription.
- B. Unfair Labor Practice (ULP) Regulations. 5 C.F.R. §§ 2423 and 2329.
- C. Unfair Labor Practice Case Handling Manual, 2010.
www.flra.gov//OGC_ULP_Manual_2010.

III. MANAGEMENT VIOLATIONS. 5 U.S.C. § 7116(A).

- A. Interference With Basic Employee Rights. 5 U.S.C. § 7116(a)(1).
 - 1. Employee rights -- The right to freely and without fear of penalty or reprisal form, join, and assist a labor organization or to refrain from such. 5 U.S.C. § 7102.
 - 2. Examples. *Hill Air Force Base and AFGE Local 1592*, 25 FLRA 342 (1987) (union steward's misrepresentation of pay grade in correspondence with headquarters was not protected activity); *Eighth U.S. Army and NFFE*, 11 FLRA 434 (1983) (denial of union president's request for extension of overseas tour found to be a ULP); *Internal Revenue Service and Brookhaven Service Center*, 9 FLRA 930 (1982) (consolidated cases where attorneys spoke with witnesses in preparation for MSPB and arbitration cases); *Fort Bragg Schools and North Carolina Federation of Teachers*, 3 FLRA 363 (1980) (principal's statements at union organizing meeting constituted a ULP).
- B. Discrimination to Encourage or Discourage Union Membership. 5 U.S.C. § 7116(a)(2).
 - 1. *Alameda Naval Air Station and Aerospace Workers Lodge 739*, 38 FLRA 567 (1990) (employee disciplined shortly after filing ULP).
 - 2. *Warner Robbins Air Force Base and AFGE, Local 987*, 52 FLRA 602 (1996) (agency did not commit a ULP by denying a temporary promotion to the union president who was on 100% official time).

- C. Improper Assistance to Labor Organizations. 5 U.S.C. § 7116(a)(3).
1. The "Neutrality Doctrine." *DA, Fort Sill and NFFE*, 29 FLRA 1110 (1987) (commander's statement in bulletin was a ULP).
 2. *Barksdale Air Force Base and NFFE*, 45 FLRA 659 (1992) (ULP to allow nonemployee union representative access without a showing that union has been unable to reach the agency's employees through reasonable, alternative means of communication).
- D. Retaliation Against an Employee Because of His Filing a Complaint or Giving Information. 5 U.S.C. § 7116(a)(4).
1. *Consumer Product Safety Commission and AFGE Local 3705*, 4 FLRA 803 (1980) (employee transferred after serving as union witness in several ULP hearings).
 2. *Alameda Naval Air Station and Aerospace Workers Lodge 739*, 38 FLRA 567 (1990) (employee disciplined shortly after filing ULP).
- E. Refusal to Negotiate in Good Faith. 5 U.S.C. § 7116(a)(5).
1. The meaning of "good faith." 5 U.S.C. § 7114(b).
 - a. Sincere resolve to reach an agreement.
 - b. Be represented by duly authorized negotiators.
 - c. Meet at reasonable times and places.
 - d. Furnish data when appropriate
 - e. If agreement is reached, sign and implement the agreement.
- F. Unilateral Changes - Past Practices.
1. Unilateral changes to conditions of employment. *GSA and AFGE, Local 2431*, 55 FLRA 493 (1999) (agency reduced amount of performance awards after ten years of using the same standard); *US Customs Service and NTEU*, 29 FLRA 891 (1987) (management renovated customs stations without negotiating); *Dept. of Treasury, IRS and NTEU*, 15 FLRA 1014 (1984) (management assigned employees to specialized work groups without negotiating).
 2. Condition of employment. *Letterkenny Army Depot and NFFE*, 34 FLRA 606 (1990) (management changed practice of allowing union representative to go with employee to meetings with selecting officials to find out why they were not selected).
 3. Past usage. Clear and consistent, long-standing, and known about and accepted by both parties. *SSA and AFGE, Local 1336*, 9 FLRA 229

- (1981) (ULP when agency refused to bargain over new office policies that eliminated extra time at lunch, breaks and office parties).
4. Actual impact. Scott AFB and NAGE, 35 FLRA 844 (1990) (management refused to bargain over issuance of RIF notices).
 5. De minimis impact. DHHS, SSA, Chicago and AFGE Local 3239, 19 FLRA 827 (1985) (sending claims officers to social service offices was de minimis); VAMC, Prescott and AFGE, 46 FLRA 471 (1992) (changing schedule of two housekeeping aids found to be more than de minimis).
 6. Waiver of union right.
 - a. Matters covered by the CBA.
 - b. Failure to request negotiations. Bureau of Engraving and Printing and IAM, 44 FLRA 575 (1992) (management unsuccessfully refused to bargain when they rearranged car pool parking because union had not bargained on the issue in the past).
 - c. Examples. *AFGE v. FLRA*, 866 F.2d 1443 (D.C. Cir. 1989) (combined appeal of two cases. In Puerto Rico, the agency tried to terminate PX privileges after over 20 years and in St. Louis, a picnic on duty time was a past practice).
 7. Preventing past practices. IRS and NTEU, 3 FLRA 655 (1980) (management prevented union use of office machines from becoming a past practice).
 8. Changing past practices.
 - a. Agency must give union notice of proposed change and the opportunity to bargain. Dep't of Treasury and National Treasury Employees Union, 55 FLRA 43 (1998) (agency committed an ULP when it changed from audio taping employee interviews as stated in the CBA to video taping those interviews without giving the union notice and the opportunity to bargain); Patents and Trademark Office and Patent Office Professional Association, 39 FLRA 1477 (1991) (cannot change a past practice without notice and opportunity to bargain even if it conflicts with contract).
 - b. If the union requests negotiation, the agency must meet and negotiate in good faith.

- c. If the union does not respond to the agency's notice within a reasonable time, the agency may implement the change. *Castle AFB and NAGE*, 18 FLRA 642 (1985) (union may waive its right if it never requests bargaining).
- d. An agency can stop a past practice immediately if it conflicts with a statute. An agency that delays changing a past practice until months later will still not be found to commit an ULP. *See Department of Navy and AFGE*, 34 FLRA 635 (1990) (no ULP where agency was improperly purchasing reflective vests for motorcycle riders, even though it did not change past practice until several months after FLRA opinion on this issue).
- e. If the parties negotiate in good faith about the proposed change, but cannot agree, the agency may initiate impasse procedures or give the union a notice of implementation.
- f. In response to a notice of implementation, a union may initiate impasse procedures. If it does, the agency must maintain the status quo.
- g. If the union does not respond within a reasonable time, the agency may implement the change.

G. Bypassing the Union.

- 1. Surveying BU employees. *See Surveys, Questionnaires, and Bypassing the Union*, Labor Relations Bulletin, No. 411, July 20, 1999 (<http://www.cpol.army.mil/library/labor/bulletins/lrb-411.html>).
 - a. An agency may question employees directly provided it does not do so in a way that amounts to attempting to negotiate directly with its employees concerning matters that are properly bargainable with its employees' exclusive representative. *IRS and NTEU*, 19 FLRA 353 (1985) (finding no ULP when the agency gave copies of proposed employee questionnaires to its union before seeking input from the employees).
 - b. An agency may not use surveys or questionnaires to deal directly with unit employees on conditions of employment. *Beale Air Force Base and AFGE, Local 2025*, 43 FLRA 1173 (1992) (finding a ULP when agency issued a memo to unit employees asking them to propose an outside location for smokers that would provide necessary shelter during inclement weather).
- 2. Other example of Bypassing the Union. *See McGuire AFB and AFGE*, 28 FLRA 1112 (1987) (agency improperly met with employee after being notified of union representation); *IRS and NTEU*, 17 FLRA 107 (1985)

(Management Employee Relations chief met with husband of grievant and negotiated settlement).

H. Furnishing Data.

1. Statutory Requirement. "[F]urnish to the exclusive representative involved, or its authorized representative, upon request and, *to the extent not prohibited by law*, data which is normally maintained by the agency in the regular course of business; which is *reasonably available* and *necessary* for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining . . ." 5 U.S.C. § 7114(b)(4).
2. Failure to provide the information in a timely manner is an unfair labor practice. *Bureau of Prisons, Lewisburg Penitentiary and AFGC Local 48*, 11 FLRA 639 (1983).
3. It is a ULP to refuse to provide documentation when the union has shown a particularized need for the information and no countervailing interests outweigh that need. *AFGC Local 2343 v. FLRA*, 144 F.3d 85 (D.C. Cir. 1998) (rejecting union's claim that particularized need is automatically established when requested documents discuss a specific incident); *DOJ, INS v. FLRA*, 144 F.3d 90 (D.C. Cir. 1998) (agency committed ULP when it failed to give union a copy of an investigatory file for which union showed it had a particularized need); *DOT, FAA, Fort Worth, Texas and Nat'l Air Traffic Controllers Assn., Local 171*, 57 FLRA 604 (2001) (agency does have an obligation to furnish after-acquired documents that are responsive to a previous Union request).

I. Refusal to Cooperate at Impasse. 5 U.S.C. § 7116(a)(6).

1. *Dep't of Air Force v. FLRA*, 775 F.2d 727 (6th Cir. 1985) (agency failed to make timely appeal of FSIP interest arbitration decision).
2. *Dep't of Energy and AFGC*, 51 FLRA 124 (1995) (agency disapproval of provision included in agreement by order of FSIP was an unfair labor practice where Authority found the provision was negotiable).

J. Enforcement of Rules in Conflict with CBA. 5 U.S.C. § 7116(a)(7).

K. Otherwise Fail or Refuse to Comply with Provisions of Chapter VII. 5 U.S.C. § 7116(a)(8).

1. Formal Discussions. "An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any

grievance or any personnel policy or practices, or other general condition of employment...” 5 U.S.C. § 7114(a)(2)(A).

2. The union is entitled to advance notice and an opportunity to be represented at any formal discussion between management and one or more bargaining unit employees concerning (1) grievances or (2) personnel policies and practices affecting the general working conditions of unit employees.
3. A formal discussion is:
 - a. A discussion. VA, Washington, D.C. and VA Medical Center, Brockton, Mass., 37 FLRA 747 (1990) (two meetings were found to be formal discussions even though there was no discussion or dialogue).
 - b. Formal. FLRA will look at totality of circumstances to determine if meeting was formal. *Marine Corps Logistics Base, Barstow, CA. and AFGE*, 45 FLRA 1332 (1992) (impromptu meeting in work area to seek volunteers for overtime not a formal discussion); *SSA, San Francisco and AFGE*, 10 FLRA 115 (1982) (no ULP where supervisor met with individual employees to get their opinions concerning assignment of work). Factors to consider:
 - (1) Whether the person who held the discussion was merely a first level supervisor or higher in the management hierarchy;
 - (2) Whether any other management representatives attended;
 - (3) Where the meeting took place;
 - (4) How long the meeting lasted;
 - (5) If scheduled, how was the meeting scheduled;
 - (6) Whether there was a formal agenda for the meeting;
 - (7) Were notes kept of the meeting;
 - (8) Whether attendance was mandatory or optional; and
 - (9) How the meeting was conducted.
 - (10) Examples.
 - (a) Between management EEO meetings occurring at the informal precomplaint counseling stage are not formal discussions within the meaning of the Statute. *IRS, Fresno Serv. Ctr. v. FLRA*, 706 F.2d 1019 (9th Cir. 1983).

- (b) EEO post-complaint settlement discussions are formal meetings requiring notice to the union and an opportunity for the union to be represented at the discussion of a unit employee's complaint. *Marine Corps Logistics Base and AFGE Local 1482*, 52 FLRA 1039 (1997).
- c. Between management and one or more bargaining unit employees,
- d. Concerning:
 - (1) Grievances, OR
 - (a) Both phone and office interviews of union witnesses in an arbitration case were found to be formal discussions. *Sacramento Air Logistics Center and AFGE 1857*, 35 FLRA 594 (1990).
 - (b) A meeting between agency counsel, employee and employee's counsel to negotiate settlement of an MSPB complaint was found to be a formal discussion. *GSA & AFGE*, 48 FLRA 1348 (1994).
 - (c) An MSPB deposition was found to be a formal discussion. The union has a right to be present, but the agency may limit their participation. *INS & AFGE*, 47 FLRA 170 (1993).
 - (d) Interviewing a BU member in preparation for an arbitration or a ULP hearing is a formal discussion. *Dep't of Veterans Affairs v. FLRA*, 3 F.3d 1386 (10th Cir. 1993) (arbitration); *F.E. Warren AFB*, 31 FLRA 541 (1988) (ULP hearing).
 - (e) Interviews of unit employees by the agency's EEO Director were formal discussions. *NLRB & NLRBPA*, 46 FLRA 107 (1992).
 - (2) Personnel policies and practices affecting the general working conditions of unit employees.
 - (i) General rules applicable to agency personnel, not discrete actions taken with respect to individual employees. *GSA and Bobbie J.*

Brunning, 50 FLRA 401 (1995) (case involving meetings with witnesses in MSPB case involving supervisor).

- e. A meeting can turn into a formal discussion, even if it does not begin as one. *Defense Logistics Agency, Defense Depot Tracy, Tracy, California and Laborers International Union*, 37 FLRA 952 (1990) (meeting with employees on how to fill out forms became formal when questions were asked); *New Cumberland Army Depot, New Cumberland, Pennsylvania*, 38 FLRA 671 (1990) (safety meeting became formal discussion when employees asked questions on alternative work schedule plan).
- f. Exceptions:
 - (1) "On the spot" job counseling and counseling sessions are not formal discussions. *SSA, San Francisco and AFGE*, 9 FLRA 48 (1982) (supervisor met with employees at their desk, employees later went by supervisor's office to ask questions).
 - (2) Pre-disciplinary oral reply. Critical factors:
 - (a) The meeting arose under 5 U.S.C. § 7513(b);
 - (b) The employee did not request union representative;
 - (c) The meeting did not involve a matter covered by § 7114(a)(2)(A); and
 - (d) The meeting did not involve an application of the parties' contract grievance procedure. *DOJ v. AFGE*, 29 FLRA 584 (1987) (union filed ULP charge over meeting with employee and employee's attorney for oral reply to proposed suspension).
- g. A formal discussion triggers agency's duty to notify the union and give a union representative an opportunity to attend.
 - (1) Mere presence of union officials is insufficient; advance notice must be given. *Department of Treasury and NTEU*, 29 FLRA 610 (1987) (union steward was present and participated in monthly meeting); *McClellan Air Force Base and AFGE Local 1857*, 29 FLRA 594 (1987) (JAG, on phone with union when witness arrived, notified union but did not invite union to the discussion).

- (3) Employee reasonably believes disciplinary action may result. *IRS v. FLRA*, 671 F.2d 560 (D.C. Cir. 1982) (whether there are reasonable grounds to believe that discipline may result from the interview is an objective standard); *DOJ, Bureau of Prisons and AFGE 3148*, 27 FLRA 874 (1987).
 - (4) Employee requests union representative.
- b. Union representative may choose not to attend. *INS and AFGE Local 1917*, 46 FLRA 1210 (1993) (agency proceeded when union representative refused to attend after the agency made repeated efforts).
- c. When employee asks for a union representative, management has three alternatives:
 - (1) Allow representative to attend,
 - (2) End the interview, or
 - (3) Give employee the option of either answering the questions without a union representative or having no interview at all. *Bureau of Prisons, Leavenworth and AFGE Local 919*, 46 FLRA 820 (1992) (Office of Inspector General investigator gave employee being interrogated the choice of remaining silent or proceeding without a union representative).
- d. Employees must be reminded of their rights under this section annually. 5 U.S.C. § 7114(a)(4). *Sears v. Dept. of Navy*, 680 F.2d 863 (1st Cir. 1982) (Navy did not need to give additional notice where they provided annual notice).
- e. Effective representation. *FAA and NAATS*, 35 FLRA 645 (1990) (union unsuccessfully requested volumes of information to represent employee at interrogation); *Bureau of Prisons, Office of Internal Affairs and AFGE, AFL-CIO Local 171*, 52 FLRA 421 (1996) (no right for employee and union rep. to consult outside interview room).
- f. Not a "right to remain silent." *Navy Public Works Center v. FLRA*, 678 F.2d 97 (9th Cir. 1982) (proposal to give right to remain silent was violation of management rights to discipline and assign work); *Metal Trades Council and Navy Public Works, Norfolk*, 15 FLRA 343 (1984) (proposal to give right to remain silent was violation of management rights to discipline and assign work).

- g. Remedy for violation. 5 U.S.C. § 7114(a)(2)(B). *DOJ, Bureau of Prisons*, 35 FLRA 431 (1990), reversed on other grounds, *DOJ v. FLRA*, 939 F.2d 1170 (5th Cir. 1991) (agency told to repeat interview, afford the employee full rights, and reconsider disciplinary action taken).
- h. Union Representative - Employee privilege. *NTEU and Customs*, 38 FLRA 1300 (1991) (it was a ULP for an investigator to order a union representative to divulge what member had said to him while he was acting in his representative capacity).

5. Fact-Gathering Sessions and Brookhaven Warnings.¹

- a. A "fact-gathering" session is an interview between an agency representative and a bargaining unit employee to ascertain necessary facts in preparation for third party proceedings. *Sacramento Air Logistics Center and AFGE*, 29 FLRA 594 (1987) (management met with union witness in an arbitration case).
- b. Brookhaven Warnings. *Internal Revenue Service and Brookhaven Service Center*, 9 FLRA 930 (1982) (consolidated cases where attorneys spoke with witnesses in preparation for MSPB and arbitration cases). Management must:
 - (1) inform the employee who is to be questioned of the purpose of the questioning,
 - (2) assure the employee that no reprisal will take place if he or she refuses, and
 - (3) obtain the employee's participation on a voluntary basis;

¹ This is actually a violation of § 7116(a)(1), Interfering, Restraining, or Coercing an Employee in the Exercise of the Employee's Rights Under the Statute, but it fits better with a discussion of formal discussions.

- (4) The questioning must occur in a context which is not coercive in nature; and
 - (5) The questioning must not exceed the scope of the legitimate purpose of the inquiry.
- c. Fact-gathering sessions may also be formal discussions that require notice and an opportunity to be present. *GSA, Region 2, New York and AFGE Local 2431*, 54 FLRA 864 (1998) (a meeting to discuss possible testimony of a third party witness in preparation for a pending arbitration hearing was also a formal discussion requiring notice to the union and an opportunity to attend).
 - d. Brookhaven Warnings must be given even if the discussion is formal and the union has been given advance notice and an opportunity to be present. *Veterans Administration and AFGE*, 41 FLRA 1370 (1991) (employees were required to go to supervisor's office to speak with attorney on the phone).

IV. MANAGEMENT'S DEFENSES TO UNFAIR LABOR PRACTICES.

- A. *De Minimis* Changes. *HHS and AFGE*, 24 FLRA 403 (1986) (change of employees title without change in duties was *de minimis*).
- B. Dual Motive ULP Cases. Agency must show that it would have taken the same action in the absence of protected activity and that the action was legitimate. *Warner Robins Air Force Base and AFGE Local 987*, 52 FLRA 602 (1996) (denial of temporary promotion for union president not a ULP); *FEMA and AFGE, Local 4060*, 52 FLRA 486 (1996) (Agency failed to establish that its failure to act on union president's request for a personnel action was legitimate).
- C. Wrong Appeal Route.
 - 1. Issues which can be raised under a statutory appeals procedure may not be raised as a ULP. 5 U.S.C. § 7116(d).

2. Except for matters covered by a statutory appeals procedure (5 U.S.C. §§ 4303, 7512 or 2302(b)(1)), other problems involving conditions of employment that are covered by the CBA may be raised by grievance/arbitration or ULP, but not both. 5 U.S.C. § 7116(d).
 - a. Parties must choose between ULP or grievance arbitration procedures.
 - b. If a party chose to file a grievance already, that party may not change its mind and the agency defense is that the ULP procedures are no longer available.
 3. If an issue is one that requires contract interpretation, the FLRA will interpret the contract using the standards and principles applied by arbitrators to determine the express terms of the agreement and the intent of the parties. *HHS and AFGE*, 47 FLRA 1167 (1993); *IRS and NTEU*, 47 FLRA 1091 (1993) (union alleged violations of union rights and agency responded that the parties had agreed in the contract that it was permissible).
- D. Defenses - Duty to Bargain.
1. No change to conditions of employment or subject matter is not a condition of employment (e.g., political activity, classification of position, etc.).
 2. Covered by statute or government-wide regulation.
 3. Management right.
 4. Permissive topic.
 5. Matter is covered by the contract.
- E. Defenses - Duty to Furnish Requested Information.
1. Prohibited by law (e.g., Privacy Act, Rehabilitation Act, etc.).
 2. Not normally maintained.
 3. Not reasonably available.
 4. Subject not within scope of bargaining.
 5. No particularized need.
- F. Defenses - Formal Discussions.
1. Not a formal discussion.
 2. Does not satisfy the indicia of formality (e.g., shop meeting over productivity or work assignment).

3. Not a discussion over terms & conditions of employment, nor a grievance.
 4. Not a representative of the agency.
- G. Defenses - Weingarten Rights
1. Not an examination.
 2. Not an agency representative. *National Aeronautics and Space Admin., et. al. v. FLRA*, 527 U.S. 229 (1999) (Office of the Inspector General investigator is a “representative of the agency when examining a bargaining unit employee and must accommodate the employee’s request for a representative); *U.S. Department of Justice, Washington D.C. & Office of the Inspector general, Dept. of Justice v. FLRA*, 266 F.3d 1228 (D.C. Cir.) (Agency IGs were representatives of the agency notwithstanding the fact that their interviews were part of a criminal investigation rather than a civil investigation).
 3. Reasonable person would not believe that discipline could result.
 4. Employee did not ask for representation.

V. UNION VIOLATIONS. 5 U.S.C. § 7116(B).

- A. Interference With Basic Employee Rights. 5 U.S.C. § 7116(b)(1).
1. All BU members receive lawyer’s assistance. *NTEU and U.S. Department of Treasury*, 1 FLRA 909 (1979) (NTEU policy of providing attorneys only for dues paying members in work related situations was ULP). *See AFG v. FLRA*, 812 F.2d 1326 (10th Cir. 1987) (requirement to provide attorney does not apply to statutory appeals); *NTEU v. FLRA*, 800 F.2d 1165 (D.C. Cir. 1986) (did not need to provide attorneys in MSPB appeals); *Fort Bragg Association of Educators and Department of Defense Dependent Schools*, 28 FLRA 908 (1987) (union not required to provide attorney for unrelated class action lawsuit).
 2. Union is not obligated to represent a non-member where employee controls procedure. *AFGE Local 1857 and Eloise F. Holkahl*, 46 FLRA 904 (1992) (employee allowed representative of her choice and since she did not pay dues the union declined).
 3. Duty of fair representation. *See also* FLRA General Counsel Memorandum to Regional Directors, subject: *The Duty of Fair Representation*, January 27, 1997.
 - a. A union may attempt to use employee complaints to try to leverage union membership, but it may not coerce bargaining unit

employees into joining by refusing to listen to their votes on union policies unless they join. National Air Traffic Controllers Association and FAA, 55 FLRA 601 (1999) (finding that the union violated the duty of fair representation when its president wrote a letter to non-union members telling them that the union's seniority policy is directly determined by union members alone).

- b. Union delay in assisting grievant was breach of duty of fair representation under circumstances. IAM and Roy G. Evans, 24 FLRA 352 (1986) (union misled employee into thinking they would file grievance). [Note: Federal employees do not have a private right of action against their unions for breach of the duty of fair representation. *Karahalios v. NFFE*, 489 U.S. 527 (1989)].

B. Cause Agency to Discriminate Against an Employee. 5 U.S.C. § 7116(b)(2).

1. Union attempting to induce discipline of nonmembers for exercising rights protected by § 7102. *OEA v. DODDS*, 11 FLRA 377 (1983) (union tried to get employee disciplined for writing letter critical of union president).

C. Coerce a Union Member as Punishment, Reprisal, or for the Purpose of Impeding the Member's Work Performance. 5 U.S.C. § 7116(b)(3).

D. Discriminate in Union Membership Based Upon Race, Color, Creed, National Origin, Sex, Age, Civil Service Status, Political Affiliation, Marital Status, or Handicapping Condition. 5 U.S.C. § 7116(b)(4).

1. *AFGE and Moore*, 22 FLRA 966 (1986) (wife of union officer alleged marital status discrimination saying she was expelled from union for her husband's actions).

E. Refusal to Negotiate in Good Faith. 5 U.S.C. § 7116(b)(5).

1. *AFGE and SSA*, 20 FLRA 749 (1985) (union signed settlement on grievance then immediately refiled on the same matter).

F. Refusal to Cooperate at Impasse. 5 U.S.C. § 7116(b)(6).

G. Call or Participate in a Strike or Work Slowdown, or Condone Such Activity. 5 U.S.C. §§ 7116(b)(7)(A)-(B).

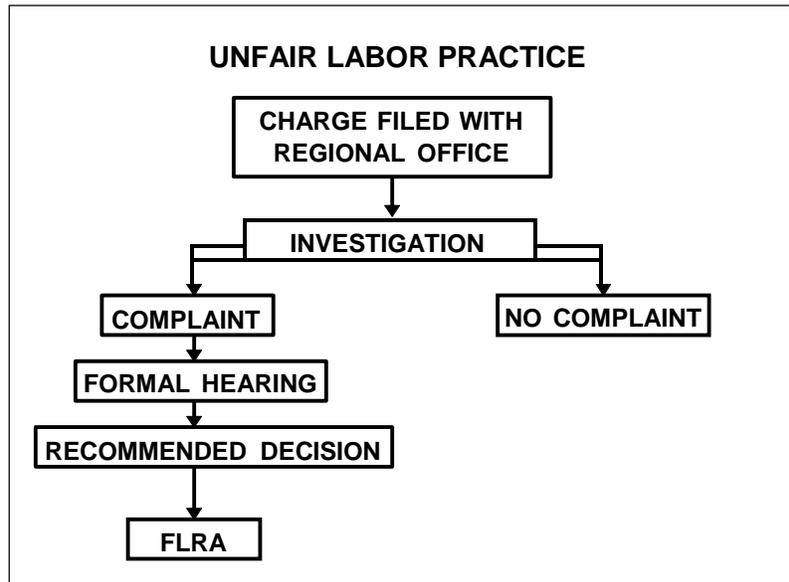
1. Union must take affirmative action to halt the work stoppage. *PATCO and FAA*, 7 FLRA 34 (1981); *Air Transport Assoc. of America v. PATCO*, 667 F.2d 316 (2d Cir. 1981) (air traffic controller cases); *U.S. v. PATCO*, 653 F.2d 1134 (7th Cir. 1981); *PATCO v. FLRA*, 685 F.2d 547 (D.C. Cir. 1982); *New York-New Jersey Council and Social Security, Baltimore*, 4 FLRA 126 (1980) (when employees walked off job for 3-6 minutes to protest conditions it constituted a work slowdown).

- H. Picketing by Federal Employees. 5 U.S.C. § 7116(b)(7)(A).
 - 1. Generally. *AFGE Local 2369 and SSA, New York*, 22 FLRA 63 (1986) (may picket if it does not interfere with agency mission).
- I. Otherwise Fail or Refuse to Comply with Provisions of 5 U.S.C. § 7116(b)(8).

VI. REMEDIES. See Enclosure 1, May 2000, FLRA General Counsel Guidance on Seeking Remedies for ULPs.

- A. Cease and desist order. *Department of Treasury and NTEU*, 37 FLRA 603 (1990); *Sacramento ALC and AFGE*, 35 FLRA 1230 (1990).
- B. Status quo ante (SQA). *Federal Correctional Institute and AFGE 2052*, 8 FLRA 604 (1982).
- C. Retroactive Bargaining Order. *U.S. Food and Drug Administration, Northeast and Mid-Atlantic Regions and AFGE Council No. 242*, 53 FLRA 1269 (1998) (Authority rejected a request for retroactive bargaining order, but stated that if the respondent “knew or should have known that its actions constituted a ULP, a RBO may be appropriate.”); *FAA Northwest Region, Renton, Washington and National Air Traffic Controllers Association*, 51 FLRA 35 (1995).
- D. Reinstate employee with backpay.
 - 1. Need statutory authority to order backpay.
 - 2. Backpay is limited to six years.
- E. Order any remedial action necessary to carry out the purposes and policies of the statute.

VII. PROCEDURES.



- A. Resolving ULPs. 5 C.F.R. §§ 2423.1 and 2423.2 (1999 amendments).
1. Before filing the charge.
 - a. Parties are encouraged to meet and, in good faith, attempt to resolve ULP disputes.
 - b. Attempts to resolve disputes informally do not toll statute of limitations for filing a charge.
 2. After filing the charge.
 - a. Parties are encouraged to informally resolve ULP allegations before a determination on the merits by the Regional Director (RD).
 - b. Collaboration and Alternative Dispute Resolution Program (CADR) services are available.
- B. The Charge.
1. Who may file a charge. 5 C.F.R. § 2423.3.
 - a. Any individual;
 - b. Any labor organization; or
 - c. Any agency.
 2. Charges may be filed against:
 - a. An activity;

- b. An agency; or
 - c. A labor organization.
3. Contents of the charge. 5 C.F.R. §§ 2423.4 & 2423.6.
- a. Specific information about the charging party and the charged party.
 - b. Clear and concise statement of the facts alleged to constitute an ULP UP 5 U.S.C. § 7116.
 - c. Supporting documents and evidence.
 - d. Charging party must serve the charge on the other parties and include a statement of service in the charge filed with the RD.
4. Time limit. 5 U.S.C. § 7118(a)(4). Generally must be filed within 6 months of the wrong unless:
- a. there was a failure of the charged agency to perform a duty owed to the person, or
 - b. there was any concealment that prevented discovery of the alleged ULP during the 6-month period.
 - c. If one of the exceptions occurs, the General Counsel (GC) may issue a complaint based on a charge filed in the 6 months after discovery.
5. Investigation by Regional Director (RD). 5 C.F.R. § 2423.8 (1999 amendments).
- a. All parties are required to cooperate fully with RD.
 - b. If a person declines to cooperate with the investigation, the RD may recommend to the GC to issue a subpoena under 5 U.S.C. § 7132.
 - c. An agency is not required to disclose intramanagement guidance, advice, counsel, or training within an agency.
 - d. During its investigation, the GC will protect the identity of persons who submit statements and information.
 - e. This confidentiality policy helps ensure that the GC obtains all relevant information.
 - f. Witness names and a summary of their expected testimony and proposed evidence will be released after issuance of a complaint and in preparation for a hearing.

- C. Regional Director's Actions. 5 C.F.R. § 2423.10.
1. Approve a request to withdraw a charge.
 2. Issue a complaint. 5 C.F.R. § 2423.20.
 - a. Decision to issue a complaint is not subject to review.
 - b. Answer. Respondent has 20 days from date of service of the complaint to file an answer with the Office of the Administrative Law Judge (ALJ). 5 C.F.R. § 2423.20(b).
 - c. Amendments. The RD may amend the complaint anytime before the answer is filed. After Respondent answers, any request to amend a complaint must be filed with the Office of the ALJ. 5 C.F.R. § 2423.20(c).
 3. Refuse to issue a complaint. 5 C.F.R. § 2423.11.
 - a. If the RD refuses to issue a complaint and the charging party does not withdraw the charge, the RD may dismiss the charge.
 - b. A charging party may appeal a dismissal decision from the RD to the GC within 25 days after service of the RD dismissal letter. 5 C.F.R. § 2423.11(c). Charging party is not required to serve a copy of the appeal on the other parties.
 4. Approve a settlement agreement. 5 C.F.R. § 2423.12.
 - a. The settlement may be between the charged and charging parties or between the Regional Director and the charged party.
 - b. The Regional Director must approve settlement agreements.
 - c. Where there is a settlement between the Regional Director and the charged party, the charging party may appeal to the General Counsel.
- D. Settlement Judge Program. 5 C.F.R. 2423.25(d).
1. Voluntary.
 2. Not the ALJ who will hear the case.
 3. All matters are confidential and cannot be used at an ULP hearing.
 4. Prepare your position.

- a. Theory or theories.
 - b. Facts.
 - c. Have your witnesses present.
- E. Prehearing conference. 5 C.F.R. § 2423.24(d).
 - 1. The ALJ hearing the case will conduct at least one conference no less than 7 days before the hearing.
 - 2. Typically, the conference is telephonic.
 - 3. Notice for the prehearing conference usually directs that prehearing witness list and an index of exhibits be provided before the meeting.
- F. Hearing is Conducted by Administrative Law Judge (ALJ). 5 C.F.R. §§ 2423.30 - 2423.34.
 - 1. All pleadings, motions, conferences, and hearings are administered by the ALJ. 5 C.F.R. § 2423.20(d).
 - a. This includes prehearing documents. 5 C.F.R. § 2423.24.
 - b. ALJ has authority to sanction any party that fails to comply with orders.
 - 2. Rules of evidence are not strictly followed. 5 C.F.R. § 2423.31(b).
 - 3. Burden of Proof. 5 C.F.R. § 2423.32.
 - a. GC has the burden of proving the allegations of the complaint.
 - b. Respondent has the burden of proving any affirmative defenses it raises.
 - c. Standard is preponderance of the evidence.
 - 4. Post-hearing briefs may be filed. 5 C.F.R. § 2423.33. Must be filed within 30 days of the close of the hearing.
 - 5. ALJ Decision and exceptions. 5 C.F.R. § 2423.34.
 - a. ALJ issues recommended decision containing findings of fact and conclusions of law.
 - b. ALJ transfers case to the Authority for decision and order.
 - c. Either party may file exceptions to the recommendation. 5 C.F.R. § 2423.40(a).
 - d. Exceptions to the recommendation must be filed within 25

days of service of the recommendation.

- (a) If exceptions are filed, the Authority will review the case on the merits and issue a decision affirming or reversing, in whole or in part, the ALJ's recommended decision.
- (b) Exceptions cannot raise a matter not raised before the ALJ. 5 C.F.R. § 2429.5.
- (c) If no exceptions are filed, the ALJ's recommendations shall become the Authority's final decision.

e. Judicial review. 5 U.S.C. § 7123.

- (a) Appeal must be filed within 60 days of the FLRA's decision to the appropriate U.S. Circuit Court of Appeals.
- (b) Appeal may not raise issues not raised before the FLRA.

VIII. CONCLUSION.

Chapter G

Equal Employment Opportunity Substantive Law

TABLE OF CONTENTS

I.	INTRODUCTION.....	2
II.	STATUTORY FRAMEWORK.....	2
III.	REFERENCES.....	5
IV.	EQUAL EMPLOYMENT OPPORTUNITY AGENCIES.....	6
V.	DISPARATE TREATMENT CASES.....	6
VI.	MIXED MOTIVE DISCRIMINATION CASES.....	9
VII.	DISPARATE IMPACT CASES.....	10
VIII.	RETALIATION AND REPRISAL.....	12
IX.	DISABILITY DISCRIMINATION.....	16
X.	SEX DISCRIMINATION.....	24
XI.	SEXUAL HARASSMENT.....	26
XII.	AGE, RACE, COLOR, NATIONAL ORIGIN, AND RELIGION DISCRIMINATION CASES.....	30
XIII.	EQUAL PAY ACT.....	35
XIV.	REMEDIAL ACTIONS.....	38

Administrative and Civil Law Department
The Judge Advocate General's Legal Center and School

Equal Employment Opportunity Substantive Law

I. INTRODUCTION.

- A. The Equal Employment Opportunity Commission (EEOC) derives its authority and jurisdiction over federal sector discrimination complaints from three primary pieces of legislation: Title VII of the 1964 Civil Rights Act, as amended, the Rehabilitation Act of 1973, as amended, and the Age Discrimination in Employment Act (ADEA), as amended. On November 21, 1991, President Bush signed Public Law 102–166, the Civil Rights Act of 1991, which made several amendments to the 1964 Civil Rights Act, as well as some modifications to the Rehabilitation Act. On October 29, 1992, the Rehabilitation Act was amended through Public Law 102–569. Through this amendment, some of the requirements of the more stringent Americans with Disabilities Act (ADA) of 1990, Public Law 101–336 (July 26, 1990), were made applicable to the federal government.
- B. As explained more fully in this chapter, there are other pieces of legislation which either give the Commission additional authority or indirectly impact upon its own authority. However, Title VII, the Rehabilitation Act, and the ADEA account for the vast majority of the EEOC caseload. The Commission also has significant responsibility and authority with respect to employment discrimination in the private sector. However, its role in the private sector should not be confused with its role in the federal sector. The processes in each sector are quite different.
- C. The Commission has jurisdiction over federal sector complaints of sex–based wage discrimination under the Equal Pay Act. To some extent, this jurisdiction is concurrent with its Title VII jurisdiction over complaints based on sex discrimination. Although the various pieces of legislation referenced above give the EEOC its substantive jurisdiction over employment discrimination in federal employment on the basis of race, color, sex, national origin, religion, disability status and age, it was another piece of legislation—the Civil Service Reform Act of 1978—that centralized jurisdiction in the Commission over federal sector employment discrimination.

II. EQUAL EMPLOYMENT OPPORTUNITY -- STATUTORY FRAMEWORK.

- A. TITLE VII, CIVIL RIGHTS ACT OF 1964, as amended, 42 U.S.C. §§ 2000e-2000e-17, prohibits discrimination on basis of race, color, religion, sex, or national origin in connection with any personnel action; retaliation or reprisal for having engaged in protected activity.

1. Persons covered: Applicants for employment, employees, and former employees.
 2. Issues: Fail or refuse to hire, discharge, or otherwise discriminate in compensation, terms, conditions, or privileges of employment; limit, segregate, or classify in a way to adversely affect person.
- B. THE EQUAL EMPLOYMENT OPPORTUNITY ACT (EEOA) OF 1972, Public Law 92-261. Title VII of the Civil Rights Act of 1964, as originally passed applied only to employment discrimination in the private sector. The EEOA made Title VII applicable to employees or applicants for employment in the federal government.
1. As amended by the EEOA, Title VII requires that "[a]ll personnel actions affecting [federal] employees or applicants for employment ... shall be made free from any discrimination based on ... sex." 42 U.S.C. § 2000e-16(a).
 2. This provision is analogous to the section of Title VII governing employment discrimination in the private sector at 42 U.S.C. § 2000e-2(a)(1).
- C. AGE DISCRIMINATION IN EMPLOYMENT ACT, 29 U.S.C. § 633a, prohibits:
1. Basis: Discrimination on basis of age 40 and over; retaliation or reprisal for having engaged in protected activity.
 2. Persons covered: Applicants for employment, employees, and former employees.
 3. Issues: Fail or refuse to hire, discharge, or otherwise discriminate in compensation, terms, conditions, or privileges of employment; limit, segregate, or classify in a way to adversely affect; or reduce wages.
- D. REHABILITATION ACT OF 1973, *as amended*, 29 U.S.C. §§ 790-794, *modified by* AMERICANS WITH DISABILITIES ACT, 42 U.S.C. §§ 12101-12213:
1. Basis: Discrimination on the basis of handicapping condition (disability); failure to reasonably accommodate qualified handicapped.
 2. Persons covered: Applicants for employment, employees, and former

employees.

3. Issue: Test applicant to screen out handicapped; fail or refuse to hire, discharge, or otherwise discriminate in compensation, terms, conditions, or privileges of employment; limit, segregate, or classify in a way to adversely affect; or reduce wages, or be denied "reasonable accommodation" if accommodation does not impose undue hardship on agency.

E. AMERICANS WITH DISABILITIES ACT OF 1990 (ADA), 42 U.S.C. §§ 12101-12213, provides protections to private-sector employees similar to those provided federal employees in the Rehabilitation Act and modifies and codifies portions of the Rehabilitation Act. The ADA modifies the term "qualified handicapped individual" to "a qualified individual with a disability." In 1992, the Rehabilitation Act (29 U.S.C. § 791(g)) was amended to make standards that apply under Title I of the Americans with Disabilities Act (42 U.S.C. § 12111 et seq.) and the provisions of §§ 501, 504, and 510 of the Americans with Disabilities Act (42 U.S.C. §§ 12201- 204, 12210) applicable in Rehabilitation Act cases to determine whether non-affirmative action employment discrimination occurred. These provisions primarily relate to discrimination based on disability and reasonable accommodation.

1. ADA Amendments Act of 2008, Pub. L. No. 110-325. Through these amendments, Congress rejected a number of U.S. Supreme Court decisions that it viewed as improperly narrowing ADA coverage in a manner that excluded individuals who were meant to fall within the protections of the act. The amendments will have a significant impact on how "individual with a disability" is defined.
2. The ADA's definition of disability will remain the same: a disability, with regard to an individual, is: 1) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; 2) a record of such an impairment; or 3) being regarded as having such an impairment. 42 U.S.C. § 12102.
3. However, the amendments provide that the definition of disability shall be construed in favor of broad coverage of individuals under the act. The EEOC will, accordingly, revise the portion of its regulations that defines the term "substantially limits" as "significantly restricted," and instead make its regulations consistent with the congressional intent of broad coverage.

4. The amendments also state that the "determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures," including medication, assistive devices, etc. However, there is a special rule regarding ordinary eyeglasses and contact lenses.

- F. THE EQUAL PAY ACT (EPA) (29 U.S.C. § 206(d)) requires equal pay for "substantially" equal work. The EPA provides that an employer shall not discriminate "between employees on the basis of sex by paying wages to employees...at a rate less than the rate (paid)...to employees of the opposite sex...for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions..." 29 USC § 206(d)(1).

- G. THE CIVIL RIGHTS ACT OF 1991, Pub. L. No. 102-166 (codified at scattered sections of 42 U.S.C.), provides for the recovery of compensatory damages of up to \$300,000 from the federal government. Punitive damages are not recoverable from the federal government.

- H. CIVIL SERVICE REFORM ACT OF 1978, Pub. L. No. 95-454, codified as amended at 5 U.S.C. §§ 1101-8913. The Civil Service Reform Act of 1978 abolishes the U.S. Civil Service Commission and distributes its functions primarily among four agencies: (1) the newly established Office of Personnel Management; (2) the Merit Systems Protection Board; (3) the Federal Labor Relations Authority; and (4) the EEOC. EEOC assumes responsibility for enforcing anti-discrimination laws applicable to the civilian federal workforce as well as coordinating all federal equal employment opportunity programs.

III. EQUAL EMPLOYMENT OPPORTUNITY REFERENCES.

- A. 29 C.F.R. Part 1614 [EEOC federal sector complaints processing].

- B. AR 690-600; AFI 36-1201; SECNAVINST 12720.5A; MCO 12713.6A.

- C. EEOC Management Directive 110 (2015). Available at: <http://www.eeoc.gov/federal/directives/md110.cfm>

- D. Administrative Judge's Handbook. Available at EEOC website.

E. Good Resources for the Labor Counselor:

1. REPRESENTING AGENCIES AND COMPLAINANTS BEFORE THE EEOC, Ernest C. Hadley, Dewey Publications Inc., <http://deweypub.com> [Book's focus is hearing practice].
2. A GUIDE TO FEDERAL SECTOR EQUAL EMPLOYMENT LAW & PRACTICE, Ernest C. Hadley, Dewey Publications Inc., <http://deweypub.com>. Updated annually. [Book's focus is substantive law].

IV. EQUAL EMPLOYMENT OPPORTUNITY AGENCIES.

- A. Equal Employment Opportunity Commission (EEOC). EEOC is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. It is also illegal to discriminate against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit. www.eeoc.gov.
- B. Merit Systems Protection Board (MSPB). 5 U.S.C. § 7702. The Civil Service Reform Act of 1978 (5 U.S.C. § 7702) gives MSPB jurisdiction to hear "mixed case appeals." This is an appeal of a personnel action that is (1) otherwise appealable to the MSPB and (2) allegedly motivated by prohibited discrimination. www.mspb.gov.

V. DISPARATE TREATMENT CASES.

- A. Definition. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977): "The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin."
- B. Proof of discriminatory motive essential. *Palmer v. Shultz*, 815 F.2d 84 (D.C. Cir. 1987), *remanded* 905 F.2d 84 (1990); *Equal Employment Opportunity Comm'n v. General Telephone Co. of Northwest, Inc.*, 885 F.2d 575 (9th Cir. 1989).
- C. The shifting burdens.

1. Plaintiff's *prima facie* case (in the context of a removal or termination case). *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *U.S. Postal Serv. v. Aikens*, 460 U.S. 711 (1983); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993); *Harding v. Gray*, 9 F.3d 150 (D.C. Cir. 1993). Prima facie case creates an *inference* of discrimination.
 - a. Member of protected class.
 - b. Qualified for job.
 - c. Rejected/discharged.
 - d. Employer filled job with someone else or still seeking similarly qualified applicants. *Washington v. Garrett*, 10 F.3d 1421 (9th Cir. 1994).
2. Defendant's burden of production. The agency's burden to articulate a legitimate, nondiscriminatory reason for its decision requires it only to raise a "genuine issue of fact" as to whether discrimination occurred. It merely "frame[s] the factual issue with sufficient clarity so that [appellant] will have a full and fair opportunity to demonstrate pretext." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981); See also *Furnco Construction Co. v. Waters*, 438 U.S. 567 (1978). Presumption of discrimination then drops out.
3. Plaintiff's rebuttal. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993); *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981).
 - a. The employer's explanation is mere "pretext" for discrimination and a discriminatory reason for the action is more likely.
 - b. Pretext can be proven in several different ways. One way is by presenting evidence of disparate treatment. See *Straughn v. Delta Air Lines, Inc.*, 250 F.3d 23, 43-44 (1st Cir. 2001). Another way is showing that the employer's proffered explanation is unworthy of credence. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 143 (2000). There is no mechanical formula for finding pretext. *Feliciano de la Cruz v. El Conquistador Resort and Country Club*, 218 F.3d 1, 6 (1st Cir. 2000).

- c. Non-Selection. In non-selection cases, the complainant may establish pretext by showing that their own qualifications were superior to those of the selectee. The Supreme Court did NOT identify the proper standard. However, the Court did point out other decisions such as *Raad v. Fairbanks North Star Borough School Dist*, 323 F.3d 1185, 1194 (9th Cir. 2003) (plaintiff's qualification are clearly superior) and *Aka v. Washington Hospital Center*, 156 F.3d 1284, 1294 (D.C. Cir. 1998) (en banc) (plaintiff significantly better qualified). While there is some disparity in the various decisions cited, presumably one or more versions would be satisfactory.
4. Even if trier of fact disbelieves the nondiscriminatory reason articulated by the employer, the trier is not compelled to find that the real reason for the action was discrimination. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. at 147. The ultimate question is not whether the employer's explanation was false, but whether discrimination was the cause of the action.
5. Ultimate burden of proof remains with plaintiff. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993); *U.S. Postal Serv. v. Aikens*, 460 U.S. 711 (1983); *Comer v. Brown*, 13 F.3d 404 (10th Cir. 1994) (table); *Cosgrove v. Sears, Roebuck, & Co.*, 9 F.3d 1033 (2^d Cir. 1993); *LeBlanc v. Great American Ins. Co.*, 6 F.3d 836 (1st Cir. 1993); *Odom v. Frank*, 3 F.3d 850 (5th Cir. 1993); *Rennie v. Dalton*, 3 F.3d 1100 (7th Cir. 1993), *cert. denied*, 510 U.S. 1111 (1994).
6. Additional "background circumstances" usually required to establish an inference of discrimination in "reverse" discrimination cases. *Harding v. Gray*, 9 F.3d 150 (D.C. Cir. 1993); *Mills v. Health Care Serv. Corp.*, 171 F.3d 450, 457 (7th Cir. 1999); *Reynolds v. School Dist. No. 1*, 69 F.3d 1523, 1534 (10th Cir. 1995); *Notari v. Denver Water Dep't*, 971 F.2d 585, 588-89 (10th Cir. 1992); *Murray v. Thistledown Racing Club, Inc.*, 770 F.2d 63, 66-67 (6th Cir. 1985). But see *Iadimarco v. Runyon*, 190 F.3d 151, 163 (3^d Cir. 1999).
7. Direct Evidence. Direct evidence may be any written or verbal policy or statement made by a management official that on its face demonstrates a bias against a protected group and is linked to the complained of adverse action. Direct evidence of discrimination obviates the need for the traditional *McDonnell Douglas* analysis. *Trans World Airlines v. Thurston*, 469 U.S. 111, 121 (1984).

VI. MIXED MOTIVE DISCRIMINATION CASES. These involve employment decisions motivated in part by an unlawful discriminatory reason.

- A. Law before the Civil Rights Act of 1991. Plaintiff proves prohibited discrimination was a contributing factor in the decision and the defendant proves by a preponderance of evidence that it would have taken the same employment action absent the prohibited discrimination. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (overruled).

- B. Current Law. Section 107 of the Civil Rights Act of 1991 modifies the "but for" test in *Price Waterhouse*. An employee who demonstrates that discrimination was "*a motivating factor*" for the employment decision has proven an unlawful employment practice. 42 U.S.C. § 2000e-2(m). *Fuller v. Phipps*, 67 F.3d 1137 (4th Cir. 1995) (overruled in part by *Desert Palace, Inc. v. Costa*, 123 S.Ct. 2148).
 - 1. Congress partially overruled *Price Waterhouse* in the Civil Rights Act of 1991 by allowing a finding of liability and limited relief to plaintiffs in mixed motive cases. See *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994).
 - a. First, section 107(a) of that Act, codified at 42 U.S.C. § 2000e-2(m), determines that an employment practice is unlawful even if there are legitimate, as well as illegitimate, motivations for it.

 - b. Next, section 107(b) of the Act, codified at 42 U.S.C. § 2000e-5(g)(2)(B), establishes that if the plaintiff proves a violation of section 107(a), but the defendant demonstrates that it "would have taken the same action in the absence of the impermissible motivating factor," the court may grant declaratory and injunctive relief as well as attorney's fees, although it cannot grant other damages, such as monetary relief or reinstatement.

 - c. Thus, where *Price Waterhouse* would have held there was no liability and so would not have allowed any damages, the 1991 Act enables an employee in at least some mixed motive cases to receive certain limited relief.

2. The employer can avoid full liability only by demonstrating by clear and convincing evidence it would have taken the same action in the absence of discrimination. 42 U.S.C. § 2000e-5(g)(2)(B). *Tanca v. Nordberg*, 98 F.3d 680 (1st Cir. 1996), *cert. denied*, 520 U.S. 1119 (1997).
3. Direct evidence of discrimination is not required in order to obtain a mixed-motive jury instruction under Title VII. Plaintiff may rely on direct or circumstantial evidence. A plaintiff must “present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that [a protected characteristic] was a motivating factor for any employment practice.” *Desert Palace, Inc. v. Costa*, 123 S.Ct. 2148, 2155 (2003).

VII. DISPARATE IMPACT CASES. These cases involve facially neutral employment practices that affect a protected group more harshly than others. Section 105 of the Civil Rights Act of 1991 overruled portions of the Supreme Court's decision in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) and established statutory burdens of proof in disparate impact cases. 42 U.S.C. § 2000e-2.

- A. Definition (*Int'l Brotherhood of Teamsters*): “[E]mployment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity.”
 1. Although traditionally applied to invalidate tests or fixed qualification standards, may be applied to cases where subjective criteria are used to make employment decisions.
 2. 1991 amendments to Title VII *superseded* portions of *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), and *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988), which held that a plaintiff in a disparate impact case must show the discriminatory effect of specific practices on protected group members. The amendments provide that if the plaintiff demonstrates that “the elements of a respondent's decision-making process are not capable of separation for analysis, the decision-making process may be analyzed as one practice.” 42 U.S.C. § 2000e-2(k)(1)(B)(i).
 3. No proof of discriminatory motive is required. Typically attacks systemic or mechanical discrimination.
- B. Plaintiff's prima facie case. 42 U.S.C. § 2000e-2(k)(1)(A).

1. Member of protected class.
2. Rejected/discharged/segregated/etc. by facially neutral employment practice.
3. Demonstrate (meet burden of production and persuasion--generally with statistical evidence) that each employment practice being challenged adversely affects protected class in disproportionate numbers (or that practices cannot be separated for analysis).

C. Defendant's rebuttal.

1. Under Section 105 of the CRA 1991, the burden of proof shifts to the employer to demonstrate that the employment practice is job related for the position in question and consistent with business necessity. 42 U.S.C. § 2000e-2(k)(1)(A)(i).
2. Business Necessity. In disparate impact Title VII cases, defendant's affirmative defense is that of business necessity. *Healey v Southwood Psychiatric Hosp.*, 78 F.3d 128 (3rd Cir. 1996).
 - a. Both burden of production and burden of persuasion in establishing business necessity rest with employer. *Lanning v SEPTA*, 181 F.3d 478 (3rd Cir. 1999).
 - b. For business necessity defense to vindicate employment policy or practice which has discriminatory effect, business purpose must be sufficiently compelling to override any racial impact, challenged practice must effectively carry out business purpose it is alleged to serve, and there must be available no acceptable alternative policies or practices which would better accommodate business purpose advanced, or accomplish it equally well with lesser or differential racial impact in action under 42 USCS § 2000e-2.

D. The employer can also rebut the underlying statistics (e.g., wrong labor market, incomplete data, and inadequate techniques) or show that other factors account for the discrepancy. 42 U.S.C. § 2000e-2(k)(1)(B)(2).

- E. Plaintiff's Reply – Alternative Business Practice. Even if defendant satisfies its burden of proof, a plaintiff can prevail by proving that an alternative business practice, which the employer refused to adopt, would have satisfied the employer's business needs without causing such an adverse impact. 42 U.S.C. § 2000e-2(k)(1)(A)(ii).

- F. *Ricci v. DeStefano*, 129 S.Ct. 2658 (2009) (White firefighters and one Hispanic firefighter sued city and city officials, alleging that city violated Title VII by refusing to certify results of promotional examination, based on city's belief that its use of results could have disparate impact on minority firefighters. The Supreme Court held that: (1) city's refusal to certify results was violation of Title VII's disparate-treatment prohibition absent some valid defense; (2) before employer can engage in intentional discrimination for asserted purpose of avoiding unintentional disparate impact, employer must have strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take race-conscious action; (3) city officials lacked strong basis in evidence to believe that examinations were not job-related and consistent with business necessity; and (4) city officials lacked strong basis in evidence to believe there existed equally valid, less-discriminatory alternative to use of examinations that served city's needs but that city refused to adopt).

VIII. RETALIATION AND REPRISAL.

- A. Unlawful business practice. Discrimination for making charges, testifying, assisting, or *participating* in enforcement proceedings. It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has *opposed* any practice made an unlawful employment practice by 42 USCS §§ 2000e-2000e-17, or because he has made a charge, testified, assisted, or *participated* in any manner in an investigation, proceeding, or hearing under 42 USCS §§ 2000e-2000e-17.

- B. Elements. *Clark County School District v. Breeden*, 532 U.S. 268 (2001); *Atkinson v. Bd. of Regents*, 4 F.3d 984 (4th Cir. 1993); *Malarky v. Texaco, Inc.*, 983 F.2d 1204 (2d Cir. 1993).

1. Individual engaged in protected activity. (It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment...because he has opposed any practice made an unlawful employment practice by this title [42 USCS §§ 2000e-2000e-17], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title [42 USCS §§ 2000e-2000e-17]. See 42 U.S.C. § 2000e-3(a)).
 - a. Opposition Clause. Example 1 – Complainant tells her manager that if he fails to raise her salary to that of a male coworker who performs the same job, she will file a lawsuit under either the federal Equal Pay Act or under her state's parallel law. This statement constitutes "opposition." Example 2 -- CP complains to co-workers about harassment of a disabled employee by a supervisor. This complaint constitutes "opposition."
 - b. Participation Clause. The provision prohibiting reprisal for participation in the EEO process extends to all stages of EEO complaints, including informal counseling. Protected activity under the participation clause is given a broad definition. The purpose of the participation clause is to insulate persons who take part in the EEO process from retaliation for their participation, because reprisal has a chilling effect on the exercise of protected rights.
2. Employer discriminates against the employee.
 - a. The term "discriminate against" is not defined in Title VII. *Burlington Northern & Santa Fe Rwy Co. v. White*, 126 S.Ct. 2405 (2006). The question of what constitutes an action that “discriminates against” (sometimes referred to as an “adverse employment action”) has received significant attention from the federal courts, which have not reached a consensus on the issue. In *Burlington Northern*, the Supreme Court held that “the scope of the anti-retaliation provision extends beyond workplace-related or employment related retaliatory acts and harm.” The Supreme Court noted that this goes beyond the “ultimate employment decisions.”

- b. Traditionally, ultimate employment decisions included such things as hiring, firing, promotion, demotion, etc. The Supreme Court went on to hold that “a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, ‘which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.’” The Supreme Court emphasized the distinction between *material adversity* and *trivial harms*. The Supreme Court re-affirmed that Title VII is not “a general civility code for the American workplace.”
 - c. The prohibition in the Age Discrimination in Employment Act (ADEA) which prohibits “discrimination on the basis of age” necessarily includes retaliation against a federal employee who files a complaint based on alleged aged discrimination. *Gomez-Perez v. Potter*, 553 U.S. 474 (2008).
 - d. An employee can “oppose” discrimination in the workplace, and thus, come under the protection of the antiretaliation provision of Title VII, by responding to someone else's question about the discrimination just as surely as by provoking the discussion. *Crawford v. Metropolitan Government of Nashville and Davidson County*, 555 U.S. 271 (2009)
3. Causal connection exists between protected activity and adverse employment action.
- a. An inference that a causal connection exists can arise where the individual shows that employer was aware of the protected activity and the adverse action follows the protected activity closely in time. *Atkinson v. Bd. of Regents*, 4 F.3d 984 (4th Cir. 1993).
 - b. Protected activity by one employee can protect another from retaliation if he is in the “zone of interest” of the first employee. *Thompson v. North American Stainless*, 131 S.Ct. 863 (2011) (retaliation claim alleging an employee was fired because his fiancée filed a discrimination complaint was valid). *Equal Employment Opportunity Comm'n v. Ohio Edison Co.*, 7 F.3d 541 (6th Cir. 1993) (a former employee was allegedly discriminated against by the withdrawal of an offer of reinstatement because a co-employee engaged in protected activity under Title VII).

- C. EEOC Position: Allegations taken together may state a claim of reprisal. Acknowledging that individually some of complainant's several allegations may not state a claim of reprisal, the Commission nevertheless found that the acts could be construed as demonstrating an intent to deter a reasonable person from pursuing the EEO process and thus state a claim of reprisal. The Commission specifically rejected the U.S. Postal Service's argument that complainant did not suffer any harm to a term, condition, or privilege of employment, citing to EEOC's Compliance Manual Section on Retaliation. *Stup v. United States Postal Serv.*, 100 FEOR 3162 (April 11, 2000). See also *Carroll v. Dep't of the Army*, 100 FEOR 3155 (April 4, 2000) (sets out EEOC's position on types of reprisal that are actionable, i.e., not restricted to those which affect a term or condition of employment).
- D. Employer Defenses.
1. Legitimate, non-retaliatory reasons for adverse action. *Atkinson v. Bd. of Regents*, 4 F.3d 984 (4th Cir. 1993); *Butler v. Dep't of Agric.*, 826 F.2d 409 (5th Cir. 1987).
 2. Decision to take adverse action was made before the protected activity. *Newton v. Leggett*, 7 F.3d 1042 (8th Cir. 1993).
 3. Employer lacked knowledge of prior protected activity. *Jackson v. Brown*, 5 F.3d 546 (10th Cir. 1993); *Malarky v. Texaco, Inc.*, 983 F.2d 1204 (2d Cir. 1993).
 4. Prolonged period of time between protected activity and adverse action negates presumption of causal connection. *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268 (2001) (if temporal proximity is the only evidence of causality establishing prima facie retaliation, proximity must be "very close"; twenty months is insufficient); *Johnson v. Dep't of Health & Human Servs.*, 30 F.3d 45 (6th Cir. 1994); *Clark v. Chrysler Corp.*, 673 F.2d 921 (7th Cir. 1982).
 - a. There is no "bright-line" rule for temporal proximity. In general terms, if it is less than 12 months, this element will be established.

2. Courts have interpreted Title VII as protecting an employee's opposition not only to practices actually made unlawful by Title VII, but also to practices that the employee *reasonably believed* to be unlawful. See e.g., *Taylor v. Runyon*, 175 F.3d 861, 869 (11th Cir. 1999); But see *O'Neal v. State*, 2006 US Dist LEXIS 81654. The Supreme Court recently avoided deciding whether this is a correct reading of the statute. *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268 (2001) (A more limited holding that employee complained about an incident that no reasonable person could believe violated Title VII).

IX. DISABILITY DISCRIMINATION. 29 C.F.R. § 1614.203.

- A. Three theories to support claim of disability discrimination:
 1. Disparate treatment (treating disabled employees less favorably than non-disabled employees);
 2. Disparate impact; and
 3. Failure to reasonably accommodate in hiring, placement, or advancement opportunities.
- B. The plaintiff's burden in disability discrimination disparate treatment cases parallels Title VII disparate treatment analysis: (*See Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003)).
 1. The employee or applicant is a disabled person;
 2. Is otherwise qualified for the job;
 3. Was subject to an adverse employment action; and
 4. Was treated less favorably than non-disabled employees. *See Daigle v. Liberty Life Ins. Co.*, 70 F.3d. 394 (5th Cir. 1995).
 5. The burden of production then shifts to the employer to articulate a valid, nondiscriminatory reason for its actions.

C. Reasonable Accommodation cases.

1. Employee must prove that he/she is a “**qualified individual with a disability.**” 42 U.S.C. § 12111(8).
2. Disabled person—has an impairment that *substantially limits a major life activity* or is *regarded* as having such an impairment or has a *record* of such impairment. 42 U.S.C. § 12102(2); 29 C.F.R. § 1614.203; *Cook v. State of Rhode Island*, 10 F.3d 17 (1st Cir. 1993); *Ruiz v. U.S. Postal Serv.*, 59 M.S.P.R. 76 (1993); *Carter v. U.S. Postal Serv.*, 102 FEOR 3014 (November 27, 2001).
3. Major Life Activities. The 2008 ADA Amendment defines major life activities as functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. Major life activity refers to those activities that are of central importance to daily life. The impairment's impact must also be permanent or long-term.
4. Substantially limits means unable to perform a major life activity that the average person in the general population can perform, or materially restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity. Materially restricted is a lower standard than significantly restricted.
 - a. Factors to consider in determining whether an individual is substantially limited in a major life activity: nature and severity of the impairment; duration or expected duration of the impairment; and permanent or long term impact or the expected permanent or long term impact of the impairment. 29 C.F.R. § 1630.2(j).
 - b. Whether an impairment substantially limits a major life activity is to be determined without reference to the ameliorative effects of mitigating measures. The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as:

- (1) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eye glasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;
 - (2) use of assistive technology;
 - (3) reasonable accommodations or auxiliary aids or services; or
 - (4) learned behavioral or adaptive neurological modifications.
 - (5) The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.
- c. Episodic or Remission: “An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.”
- d. When addressing the major life activity of performing *manual tasks*, the central inquiry must be whether the claimant is unable to perform the variety of tasks central to most people's daily lives, not whether the claimant is unable to perform the tasks associated with her specific job. *Skorup v. Modern Door Corp.*, 153 F.3d 512 (7th Cir. (1998).
- e. With respect to the major life activity of *working*, the term substantially limits means materially restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working. 29 C.F.R. § 1630.2(j); *Brunko v. Mercy Hosp.*, 260 F.3d 939 (8th Cir. 2001) (40-pound lifting restriction was not disability within the meaning of the ADA when limitation precluded employee from performing only a narrow range of jobs).

5. Employee must prove he/she is otherwise qualified for the position. *Owens v. U.S. Postal Serv.*, 37 F.3d 1326 (8th Cir. 1994). This means the employee can perform the *essential functions of the position*, with/without reasonable accommodation. 42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2(m). This is a very fact-specific determination made on case-by-case basis. *Carr v. Reno*, 23 F.3d 525 (D.C. Cir. 1994); *Miranda v. Wisconsin Power & Light Co.*, 91 F.3d 1011, 1017 (7th Cir. 1996) (reasonable accommodation enables employee to perform essential job functions); *Spangler v. Fed. Home Loan Bank of Des Moines*, 278 F.3d 847 (8th Cir. 2002) (Absences from work due to depression prevented employee from performing essential function of her job); *Mathews v. Denver Post*, 263 F.3d 1164 (10th Cir. 2001) (Mailroom employee with epilepsy failed to show that he could perform essential functions of job requiring him to work with machinery, with or without accommodation).

6. Determination regarding disability is made by individualized assessment (case-by-case basis). *Lowe v. Alabama Power Co.*, 244 F.3d 1305, 1308 (11th Cir. 2001) (Double-amputee may proceed with his claims under ADA because employer's physician did not base his restrictions on a timely, particularized assessment of the employee's capabilities).

7. Employer Defenses.
 - a. Employee is not a "qualified individual with a disability." *Motley v. Dep't of Air Force*, 102 FEOR 30062 (February 6, 2002); *Hickman v. Dep't of Justice*, 101 FEOR 30001 (December 20, 2001).

 - b. The condition is not an impairment under the law.
 - (1) Examples: HIV is an impairment. *Bragdon v. Abbott*, 524 U.S. 624 (1998). Obesity may or may not be an impairment. *See e.g., Francis v. Meriden*, 129 F.3d 281, 286 (2d Cir. 1997) (Obesity, except in special cases where the obesity relates to a physiological disorder, is not a physical impairment); *Walton v. Mental Health Ass'n*, 168 F.3d 661 (3d Cir. 1999). *But see Hazeldine v. Beverage Media*, 954 F.Supp. 697, 703 (S.D.N.Y. 1997).

- (2) Statutory exclusions include homosexuality, pedophilia, compulsive gambling, pyromania, etc. *See* 29 C.F.R. § 1630.3.
- c. The impairment does not substantially limit a major life activity. *Price v. Marathon Cheese Corp.*, 119 F.3d 330, 336 (5th Cir. 1997) (Employee with carpal tunnel syndrome was able to perform other jobs; she was not substantially limited in one or more major life activities); *Weiler v. Household Fin. Corp.*, 101 F.3d 519, 524 (7th Cir. 1996) (Major life activity of working was not substantially limited simply because employee's stress rendered her unable to work only under specific supervisor); *Hickman v. Dep't of Justice*, 101 FEOR 30001 (December 20, 2001) (DEA investigator found not disabled in major life activity of working due to his marijuana allergy; he was not significantly restricted in ability to perform either a class of jobs or a broad range of jobs in various classes).
- d. Temporary Conditions. Temporary or transitory medical conditions generally are not substantially limiting impairments. *Haralsen v. U.S. Postal Serv.*, 102 FEOR 30043 (March 1, 2002) (One-month lifting restriction). But chronic or episodic disorders that are substantially limiting when active *may* qualify. Employee's performance cannot endanger health or safety of himself or others. *See Chevron v. Echazabel*, 536 U.S. 73 (2002). An individual with a disability is not "qualified" if they pose a direct threat to the health of themselves or others. 42 U.S.C. § 12113; 29 C.F.R. § 1630.15(b)(2); *Waddell v. Valley Forge Dental Associates, Inc.*, 276 F.3d 1275 (11th Cir. 2001) (Dental hygienist's HIV-positive status posed a significant risk to the health of patients that could not be eliminated by reasonable accommodation, and thus he was not a "qualified individual" within meaning of ADA and Rehabilitation Act).
- e. Undue Hardship. No accommodation required if it would impose an undue hardship on agency's operation. *Vande Zande v. State of Wisconsin Dep't of Admin.*, 44 F.3d 538 (7th Cir. 1995) (Financial condition of an employer is only one consideration in determining whether accommodation otherwise reasonable would impose undue hardship); *EEOC v. Amego, Inc.*, 110 F.3d 135, 148 (1st Cir. 1997) (Small nonprofit agency cannot afford expense of duplicate employees to relieve plaintiff of duties); *Bolstein v. Dep't of Labor*, 55 M.S.P.R. 459 (1992); *Gallegos v. Fed. Deposit Ins. Corp.*, EEOC Appeal No. 01A04080 (August 30, 2002) (Employer does not have to provide an employee with a new supervisor as a reasonable accommodation).

- f. Seniority Systems. Employer’s showing that requested accommodation conflicts with seniority rules is ordinarily sufficient to show that accommodation is not reasonable; employee may present evidence of special circumstances that makes exception to seniority rule reasonable under particular facts. *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002).
8. Agency is not obligated to assign employee to permanent light duty. *Bauman v. Dep’t of Navy*, 55 M.S.P.R. 209 (1992).
- a. Reassignment as reasonable accommodation. Offering the employee a reassignment to another position should be considered the accommodation of *last resort*. *Angin & Angin v. U.S. Postal Serv.*, 102 FEOR 3002 (August 22, 2001).
 - (1) The EEOC amended the Federal government’s “reassignment rule” (29 C.F.R. § 1614.203) to align it with the ADA standard (29 C.F.R. § 1630.2) on May 21, 2002. Under the old rule, employers had to offer to reassign a qualified disabled employee to a funded vacant position located in the *same commuting area* and serviced by the *same appointing authority*, unless the agency can demonstrate that the reassignment would impose an undue hardship or disruption on the agency. The new rule *broadens* the agency’s job search requirement by eliminating the “same commuting area – same appointing authority” language. Reassignment to a “different component of the same department” may now be required, barring undue hardship. It is unclear whether this means our job search would have to be Army-wide or DOD-wide. *Reid v. U.S. Postal Service*, EEOC Appeal No. 01995610 (February 8, 2001).
 - (2) Vacancies. Burden on complainant to establish likely vacancies. Complainant bears the burden of establishing likely vacancies in cases of reasonable accommodation involving reassignment. The Commission held that, in the reassignment context, an agency’s failure to conduct either any search at all, or a broad enough search for a position, does not, by itself, result in a finding of discrimination. Instead, complainant must show that it is more likely than not that there were vacancies available, during the relevant time period, into which she could have been reassigned. *McIntosh v. U.S. Postal Service*, 103 FEOR 168 (January 13, 2003).

- (3) Practical Advice. If a reassignment job search becomes necessary, start by asking the employee where they would be willing to move. If the employee freely states he would not move, there is no need to search beyond the local area. Document all of this in writing so that we can properly defend the “failure to reasonably accommodate” claim.
- b. No Requirement to Create New Position or Bump Other Employee. An agency need not establish a new position to accommodate a handicapped employee, nor is it required to accommodate a disabled employee by bumping another employee from his or her position. *See generally Fedro v. Reno*, 21 F.3d 1391 (7th Cir. 1994); *Cassidy v. Detroit Edison Co.*, 138 F.3d 629, 634 (6th Cir. 1998).
- c. Agency’s “good faith” attempts to accommodate will preclude recovery of compensatory damages. 42 U.S.C. § 1981a(a)(3); *Hocker v. Dep’t of Transp.*, 63 M.S.P.R. 497 (1994).
- d. Employee failure to cooperate. Employees must cooperate with the accommodation process. If employee fails to submit sufficient medical evidence to allow the agency to determine what accommodation, if any, was appropriate, the agency may proceed with disciplinary action. The EEOC has noted that the process of identifying a reasonable accommodation is an interactive one, i.e., one in which petitioner and agency work together to identify petitioner’s specific physical limitations, identify potential accommodations, and assess how effective each would be. *Medlock v. Dep’t of Air Force*, 98 FEOR 1143 (1998).
- e. Alcoholism and drug dependence as handicapping conditions; accommodating the alcoholic or drug addict. *Lazenby v. Dep’t of Air Force*, 66 M.S.P.R. 514 (1995); *Anderson v. Dep’t of Transportation*, 59 M.S.P.R. 585 (1993); 42 U.S.C. § 2000e-2(k)(3); 29 C.F.R. § 1614.203(h).
- (1) In the past, alcoholism was viewed as a disability. Reasonable accommodation of an alcoholic required: (1) counseling; (2) a “firm choice” between treatment and discipline (last chance agreement); (3) outpatient treatment; (4) inpatient treatment; and (5) discharge. If the employee did not complete rehabilitation, chose not to participate, or fell off

the wagon, he was subject to removal. However, no discipline was allowed before a firm choice was given. *Crewe v. OPM*, 834 F.2d. 140 (8th Cir. 1987); *Rogers v. Lehman*, 869 F.2d. 253 (4th Cir. 1989).

- (2) The current EEOC position. Federal employers are no longer required to provide the reasonable accommodation of a “firm choice” because the Rehabilitation Act Amendments of 1992 changed the applicable standard. The EEOC noted that Section 104(c)(4) of the ADA (29 U.S.C. § 12114 (c)(4)) permits an employer to hold an alcoholic employee to the same qualification standards for employment, or job performance and behavior, as other employees. *Johnson v. Babbitt*, 96 FEOR 3123 (March 28, 1996).
 - (3) The MSPB later held that the EEOC’s decision in *Johnson* had a reasonable basis and adopted the EEOC rule. The MSPB stated: “In so doing we overrule *Harris*, 57 M.S.P.R. 124; *Banks v. Dep’t of Navy*, 57 M.S.P.R. 141 (1993); and *Carlton*, 44 M.S.P.R. 477, as well as all other Board decisions that may be interpreted to require imposition of the firm choice rule following the effective date of the Rehabilitation Act Amendments of 1992, October 29, 1992.” *Kimble v. Dep’t of Navy*, 70 M.S.P.R. 617 (1996).
 - (4) Under the ADA, any person “who *currently* and knowingly uses or possesses a controlled substance” is excluded from the protections of the ADA.
- f. Agency Delays or Non-Action. Ignoring a request for accommodation or putting off a decision will be held to be the same as a denial of the request. *See Burns v. INS*, 101 FEOR 30311 (January 19, 2001).
- g. Practical Advice. Supervisors often attempt accommodation without first properly determining that the employee is a “qualified individual with a disability” under the law. This first step is a necessary, yet often time-consuming process that requires coordination with the CPAC, the EEO Officer, and the Labor Counselor. The employee (or applicant for employment) must cooperate in this process (e.g., must provide requested medical documentation).

- h. Job Accommodation Network (JAN): a service of the US Department of Labor’s Office of Disability Employment Policy that offers assistance when hiring, retaining or accommodating employees with disabilities. <https://askjan.org>.

X. SEX DISCRIMINATION.

- A. Overview. Sex discrimination occurs when an employee or applicant for employment is treated adversely or disparately based on sex. Sex discrimination, which is prohibited by Title VII of the Civil Rights Act of 1964, can occur in a variety of contexts, including sexual harassment and disparate treatment in the application of terms and conditions of employment. Title VII’s prohibition of discrimination “because of ... sex” protects men as well as women, *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 682 (1983). Also, as recent case law developments reflect, discrimination based on gender identity, sexual stereotyping, or sexual orientation is discrimination on the basis of “sex” under Title VII.
- B. Gender identity and sexual stereotyping.
 - 1. *Macy v. Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives*, 112 LRP 20796, EEOC No. 0120120821, 2012 WL 1435995 (EEOC 2012). Mia Macy, a transgender woman and applicant for employment, filed a formal EEO complaint alleging that the agency discriminated against her on the basis of sex, gender identity (transgender woman), and sex stereotyping when the agency advised her that a position was no longer available after Macy informed the agency that she was transitioning from male to female. The agency accepted Macy’s complaint as it related to sex. However, the agency did not recognize Macy’s complaint as it related to gender identity and sex stereotyping as cognizable claims under Title VII and therefore refused to investigate or adjudicate those claims under EEOC regulations. The EEOC held that a claim of intentional employment discrimination by a federal agency against a transgender individual, because that person is transgender, is a Title VII claim of sex discrimination. The EEOC grounded its holding in the following principles:
 - a. “As used in Title VII, the term “sex” encompasses both sex—that is, the biological differences between men and women—and gender (citations omitted).”
 - b. “Title VII bars not just discrimination because of biological sex, but also gender stereotyping—failing to act and appear according to expectations defined by gender (internal quotation and citations omitted).”

- c. The EEOC reasoned that “[i]f Title VII’s proscribed only discrimination on the basis of biological sex, the only prohibited gender-based disparate treatment would be when an employee prefers a man over a woman, or vice versa.”
- d. Rejecting such a narrow interpretation of Title VII, the EEOC determined that the statute’s protections are much broader, as the term “‘gender’ encompasses not only a person’s biological sex but also the cultural and social aspects associated with masculinity and femininity.”
- e. The EEOC emphasized that a federal agency may not discriminate against an employee because the he or she expresses his or her gender in a non-stereotypical fashion.

C. Gender identity and sexual stereotyping.

- 1. *Lusardi v. Department of Defense, Department of the Army*, 115 LRP 14324, 2015 WL 1607756 (EEOC 2015). Tamara Lusardi, a transgender woman and Army employee, was subjected to sex-based harassment and disparate treatment, when she was not allowed to use the women's restroom and when a supervisor repeatedly called her “Sir.” The EEOC rejected the Army’s justifications for its decision to deny Lusardi access to the women’s restroom.
 - a. First, the Army argued that it would not allow Lusardi to use the common female restroom because co-workers would feel uncomfortable with this approach. The EEOC stated that supervisory or co-worker confusion or anxiety cannot justify discriminatory terms and conditions of employment. “Title VII prohibits discrimination based on sex whether motivated by hostility, by a desire to protect people of a certain gender, by gender stereotypes, or by the desire to accommodate other people's prejudices or discomfort.”
 - b. Second, the Army argued that Lusardi agreed in writing to use a “single-shot restroom” until she completed an undefined surgical procedure and then make a request to use the common women’s restroom. The EEOC stated that “nothing in Title VII makes any medical procedure a prerequisite for equal opportunity,” and “an agency may not condition access to facilities -- or to other terms, conditions, or privileges of employment -- on the completion of certain medical steps that the agency itself has unilaterally determined will somehow prove the bona fides of the individual's gender identity.”

D. Sexual orientation.

1. *Baldwin v. Department of Transportation, Federal Aviation Administration*, 0120133080, 115 LRP 31813, 2015 WL 4397641 (EEOC OFO July 15, 2015). David Baldwin, a supervisory Air Traffic Control specialist, filed a formal EEO complaint alleging that he was not selected for a permanent management position on the basis of sex (male, sexual orientation). In its final decision, the agency stated that it would not process Baldwin's complaint under the EEOC's procedures. The EEOC held that "sexual orientation is inherently a 'sex-based consideration,' and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII."
 - a. Title VII's prohibition of sex discrimination means that employers may not "rel[y] upon sex-based considerations" or take gender into account when making employment decisions. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239, 241-42 (1989); *Macy v. Dep't of Justice*, EEOC Appeal No. 0120120821, 2012 WL 1435995, at *5 (EEOC Apr. 20, 2012) (quoting *Price Waterhouse*, 490 U.S. at 239).
 - b. As with any other Title VII case involving allegations of sex discrimination, in claims of sexual orientation discrimination, the issue is whether the agency has "relied on sex-based considerations" or "take[n] gender into account" when taking the challenged employment action.

XI. SEXUAL HARASSMENT.

- A. Old Terms: Traditionally, federal courts categorized sexual harassment claims as Quid Pro Quo or Hostile Work Environment:
 1. "Quid Pro Quo." A request for sexual favors in return for a job benefit, or in connection with the threat of the loss of a job, grade, or an unfavorable performance rating if the employee fails to grant the requested favors.
 2. "Hostile Work Environment." Deliberate or repeated verbal comments, gestures, or physical contact of a sexual nature that create an offensive or hostile workplace.
- B. Current Terms: The Supreme Court appears to reject the traditional model in two decisions handed down in 1998. In *Ellerth*, the Supreme Court discussed whether

the "quid pro quo" and "hostile environment" terms had outlived their usefulness. "The terms quid pro quo and hostile work environment are helpful, perhaps in making a rough demarcation between cases in which threats are carried out and those where they are not or are absent altogether, but beyond this they are of limited utility." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 751 (1998). The current labels for sexual harassment are "tangible employment action" harassment and "hostile work environment" harassment.

- C. "Tangible Employment Action" Harassment. Sexual harassment that results in a negative tangible employment action. This type of harassment almost invariably involves harassment by the supervisor.
 - 1. The action must constitute a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).
 - 2. A tangible employment action would not include a "bruised ego," a demotion without change in pay, benefits, duties, or prestige, or a reassignment to a more inconvenient job. *Id.*
 - 3. Although direct economic harm is an important indicator of a tangible adverse employment action, it is not the sine qua non. If employer's act substantially decreases employee's earning potential and causes significant disruption in his or her working conditions, a tangible employment action may be found. *Durham Life Insurance Co. v. Evans*, 166 F.3d 139 (3d Cir. 1999).
 - 4. Job transfer was a tangible employment action, despite fact that no loss of pay occurred, where new position was "objectively worse— such as being less prestigious or less interesting or providing less room for advancement." *Sharp v. Houston*, 164 F.3d 923, 933 (5th Cir. 1999).
 - 5. Sexual advances must be "unwelcome." 29 C.F.R. § 1604.11(a).
- D. Hostile Environment Harassment. Sexual harassment that is so objectively offensive as to alter the conditions of employment even though the victim suffers no tangible employment action.
 - 1. The conduct must be "severe or pervasive." *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986). Single act versus pattern of conduct: the requirement for repeated exposure will vary inversely with the severity of the offensiveness of the incidents.
 - 2. Do not measure the conduct in isolation. Look at all the circumstances, such as frequency of the discriminatory conduct, its severity, whether it

is physically threatening or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993).

3. "Simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'" *Farragher v. Boca Raton*, 524 U.S. 775, 788 (1998).
4. The conduct must be unwelcome. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986); *Beard v. Flying J, Inc.*, 266 F.3d 792 (8th Cir. 2001).
5. Complainant's Participation. Employee's hostile work environment claim was rejected because of her active and often enthusiastic participation in sexual shenanigans. *Reed v. Shepard*, 939 F.2d 484, 491- 92 (7th Cir. 1991). But employees do not forfeit their rights to be free of a sexually offensive workplace merely because they participate to some degree in sexual horseplay, especially when they engage in such behavior defensively. See *Carr v. Allison Gas Turbine Div.*, 32 F.3d 1007 (7th Cir. 1994) (Employee's use of vulgar language is not fatal to her claim because she otherwise made clear that she did not welcome the sexually-directed actions of others).
6. Does not require the loss of job benefits or opportunities. *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981).
7. Psychological and emotional work environment as a condition of employment. A violation can be shown either by evidence that the misconduct interfered with an employee's work or that the environment could "reasonably be perceived and is perceived as hostile or abusive." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993).
8. "Reasonable person" and "reasonable victim" test. Objective/subjective elements. *Harris v. Forklift Systems Inc.*, 510 U.S. 17 (1993). A "sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so." *Farragher v. Boca Raton*, 524 U.S. 775 (1998).
9. Need not necessarily be directed at complainant. Evidence of harassment directed at employees other than the plaintiff is relevant to show a hostile work environment. *Hall v. Gus Construction Co., Inc.*, 842 F.2d 1010 (8th Cir. 1988); *Broderick v. Ruder*, 685 F. Supp. 1269 (D.D.C. 1988).
10. The harassing official need not be of the opposite sex as the complainant. *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998).

11. Female plaintiff is not required to show that only women were subjected to harassment, so long as she shows that women were primary target of such harassment. *Beard v. Flying J, Inc.*, 266 F.3d 792 (8th Cir. 2001) (Male supervisor also harassed male employees by among other things, speaking to them in sexual terms).

E. Agency Liability for Sexual Harassment by Supervisors. In *Faragher* and *Ellerth*, the Supreme Court devised a special framework for imposing vicarious liability on employers in cases involving harassment by supervisors.

1. Tangible employment action. A showing that the behavior of the offending supervisor amounted to a tangible employment action results in the automatic imposition of liability on the employer.
2. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, consisting of two elements:
 - a. The employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and
 - b. The employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise. *Faragher*, 524 U.S. at 807-808; *Ellerth*, 524 U.S. at 764-65.

F. Constructive Discharge. A person alleging constructive discharge in violation of Title VII, must generally prove "(1) he or she suffered harassment or discrimination so intolerable that a reasonable person in the same position would have felt compelled to resign . . . ; and (2) the employee's reaction to the workplace situation--that is, his or her decision to resign--was reasonable given the totality of circumstances" *Pennsylvania State Police v. Suders*, 124 S.Ct. 2342, 2350 (2004) (citations omitted).

1. "Title VII encompasses employer liability for a constructive discharge." *Id* at 2352.
2. "We conclude that an employer does not have recourse to the *Ellerth/Faragher* affirmative defense when a supervisor's official act

precipitates the constructive discharge; absent such a ‘tangible employment action,’ however, the defense is available to the employer whose supervisors are charged with harassment.” *Id* at 2351.

- a. Official Act. Employee complained of sexual harassment by a judge. The presiding judge transferred her to a new position, warned her the first 6 months would be hell, and encouraged her to resign. The *Ellerth/Faragher* affirmative defense is not available. (citing *Robinson v. Sappington*, 351 F.3d 317 (7th Cir. 2003)).
 - b. No Official Act. Employee alleged wrongful discharge based on supervisor’s repeated sexual comments and after being sexually assaulted. *Ellerth/Faragher* affirmative defense is available because there was no official action and no direct exercise of company authority. (citing *Reed v. MBNA Marketing Systems, Inc.*, 333 F.3d 27 (1st Cir. 2003)).
- G. Agency Liability for Sexual Harassment by Non-Supervisors and/or Co-Workers. Employer is liable only if the employee can demonstrate that the employer was negligent, i.e., knew or should have known of the sexual harassment and failed to take prompt and appropriate action. *Crowley v. L.L. Bean, Inc.*, 303 F.3d 387, 401 (1st Cir. 2002); *Spicer v. Commonwealth of Virginia Dep’t of Corrections*, 66 F.3d 705, 710 (4th Cir. 1995) (reversing an award for sexual harassment and attorney’s fees because the employer acted immediately and effectively to eliminate the offensive, yet isolated, behavior); *Carr v. General Motors Corp.*, 32 F.3d 1007 (7th Cir. 1994) (There are two issues in hostile environment analysis of employer liability: whether the employee was subjected to a hostile working environment and whether the employer’s response or lack of response to the situation was negligent).

XII. AGE, RACE, COLOR, NATIONAL ORIGIN, AND RELIGION DISCRIMINATION CASES.

- A. AGE DISCRIMINATION IN EMPLOYMENT ACT. See 29 C.F.R. Part 1625.
 1. Intra-class discrimination: In *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 586 (2004), the Supreme Court rejected claims that favoritism toward older workers violated the ADEA. It concluded that such

claims were outside the scope of the Act because Congress only intended “to protect a relatively older worker from discrimination that works to the advantage of the relatively young” (Cline, 540 U.S. at 591). Accordingly, the EEOC has proposed an amendment to its regulations to reflect that, “favoring an older individual over a younger individual because of age is not unlawful discrimination under the Act, even if the younger individual is at least 40 years old.”

2. Individuals under age 40: The ADEA does not protect persons under age 40 from age discrimination; however, they are protected from retaliation for engaging in protected activity.
3. Years of service: An employment action based solely on an individual's years of service constitutes “disparate treatment” under the ADEA where years of service are a proxy for age. Such an action may also be unlawful if it has a “disparate impact” based on age.

B. Disparate Impact. A disparate impact claim can be maintained under the ADEA. 29 U.S.C. § 623(a)(1, 2).

1. Claims of disparate impact discrimination may be raised under the ADEA. However, unlike claims raised under Title VII, an employer may avoid a finding of disparate impact age discrimination by showing its action was based on “a reasonable factor other than age.” When the exception of “a reasonable factor other than age” is raised against an individual claim of discriminatory treatment, the employer bears the burden of showing that the “reasonable factor other than age” exists factually. 29 C.F.R. 1625.7(e). This was done by the defendant, and the Supreme Court found no discrimination. *Smith, et al. v. City of Jackson, Mississippi, et al.*, 544 U.S. 228 (2005).
2. When an employment practice uses age as a limiting criterion, the defense that the practice is justified by a reasonable factor other than age is unavailable. 29 C.F.R. 1625.7(c).
3. When an employment practice, including a test, is claimed as a basis for different treatment of employees or applicants for employment on the grounds that it is a “factor other than” age, and such a practice has an adverse impact on individuals within the protected age group, it can only be justified as a business necessity. 29 C.F.R. § 1625.7(d).

C. Disparate Treatment. To establish a disparate-treatment claim, a plaintiff must prove that age was the “but-for” cause of the employer’s adverse decision. See

Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 128 (2008).

1. Burden-Shifting. The plaintiff retains the “burden of persuasion” to establish the "but-for" cause of the employer's adverse action. Because Title VII is materially different with respect to the relevant burden of persuasion, interpretation of the ADEA is not governed by Title VII decisions such as Price Waterhouse and Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003). The Supreme Court has never applied Title VII's burden- shifting framework to ADEA claims and declines to do so now. When conducting statutory interpretation, courts "must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination." Fed. Express Corp. v. Holowecki, 552 U.S. 128 (2008).
 2. The ADEA's text does not authorize an alleged mixed-motives age discrimination claim. The ordinary meaning of the ADEA's requirement that an employer took adverse action "because of" age is that age was the "reason" that the employer decided to act. See Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993).
- D. Special rules that apply to ADEA cases.
1. Plaintiff can bypass administrative equal employment opportunity procedures by filing a notice of intent to sue with the EEOC, wait 30 days, and then file civil action in federal district court. 29 U.S.C. § 633a(c), (d); 29 C.F.R. 1614.201(a).
 2. Older Workers' Benefit Protection Act (29 U.S.C. § 626(f)) provides that individual may not waive any right or claim under the ADEA unless the waiver is knowing and voluntary and meets several statutory requirements (i.e., settlement specifically refers to rights or claims arising under the ADEA, complainant advised in writing to consult attorney before signing agreement, etc.).
 3. No right to attorney fees for administrative processing phase of ADEA cases.
 4. No right to jury trial and no compensatory damages.
- E. Race and Color. Title VII prohibits both race and color discrimination. Ford v. Dep't of Army, 102 FEOR 3013 (December 6, 2001). Courts, however, do not always distinguish them. The EEOC finds it unnecessary to determine whether an adverse action was based on race or on color as long as the charging party alleges one or the other, or both. (Race/color discrimination may also overlap with

national origin discrimination.)

1. Physical characteristics: Discrimination based upon the physical characteristics associated with a particular race, even where the charging party and the alleged discriminator are members of the same race. For example, Title VII prohibits discrimination against an Asian individual because of physical characteristics, e.g., facial features or height.
 - a. Skin color: Discrimination based upon the shade of skin color. For example, it would be unlawful for an employer to discriminate against dark or light-skinned African-Americans. *Walker v. Secretary of the Treasury*, 713 F. Supp. 403, 405-08 (N.D. Ga. 1989).
 - b. Association with a protected individual: Discrimination due to association with an individual of a particular race or color is prohibited. For example, it is unlawful to take an adverse employment action against a white employee because s/he is married to an individual who is Native American or because s/he has a mixed-race child. *Tetro v. Elliott Popham Pontiac*, 173 F.3d 988 (6th Cir. 1999) (White employee who alleges he was discharged because he has a biracial child stated Title VII race claim).
- F. National Origin. 29 C.F.R. Part 1606.
1. Discrimination based upon the place of origin or on the physical, cultural, or linguistic characteristics of a national origin group. Sometimes, national origin discrimination overlaps with race discrimination, and in such cases, the basis of discrimination can be categorized as both race and national origin. For example, discrimination against a Native American may be race and/or national origin discrimination. *Stone v. Dep't of Treasury*, 102 FEOR 12080 (July 6, 2001).
 2. Accent/Language. Discrimination based upon the accent, manner of speaking, or language fluency. *See, e.g., Carino v. University of Okla. Bd. of Regents*, 750 F.2d 815, 819 (10th Cir. 1984) (foreign accent that does not interfere with ability to perform position in question is not legitimate basis for adverse treatment).
 3. Multilingualism. National origin discrimination may include requiring multilingual employees to perform more work than unilingual colleagues without additional compensation.

4. English-Only Rules. Employees may be required to speak English if the rule is justified by business necessity. Noting that a ban on employees speaking their primary language in the workplace presumptively violates Title VII, the Commission found that an agency policy preventing employees from speaking Spanish in the reception area where they serviced non-Spanish speaking customers, while permitting Spanish in private conversations in private offices did not constitute prohibited discrimination. *Alvarez v. Dep't of Veterans Affairs*, 103 FEOR 279 (March 6, 2003).
 5. Citizenship: The EEO statutes protect all employees who work in the United States for covered employers, regardless of citizenship status or work authorization.
 6. Association with a protected individual: Discrimination based upon an individual's association with someone of a national origin group. Thus, for example, it would be unlawful to discriminate against an individual because s/he is married to someone of Middle Eastern origin.
- G. Religion. 29 C.F.R. Part 1605.
1. EEOC defines "religion" to include moral or ethical beliefs as to right and wrong that are sincerely held with the strength of traditional religious views. The Commission will not determine what is or is not a religion. Coverage is extended to atheists.
 2. Reasonable Accommodation: Title VII requires agencies to provide reasonable accommodations for an individual's religious practices, such as leave to observe religious holidays, unless doing so would cause an undue hardship. [NOTE: The standard for reasonable accommodation and undue hardship for religious accommodation is different than the standard for disability accommodation]. *Galera v. Dep't of Agric.*, EEOC Appeal No. 01992382 (September 6, 2001) (use of compensatory time off as an accommodation – “it is reasonable to conclude that permitting complainant to use compensatory time in observance of Holy Thursday would not have adversely affected the efficient accomplishment of the agency's mission”).
 3. Association with a protected individual: Title VII prohibits discrimination against an individual because s/he is associated with another person of a particular religion. For example, it would be unlawful to discriminate against an employee because s/he is married to a Muslim.
 4. *Hosanna-Tabor Evangelical Church and School v. EEOC*, 132 S.Ct. 694 (2012). The employee, who had been a teacher at a school in Redford, Mich.,

that was part of the Lutheran Church-Missouri Synod, the second- largest Lutheran denomination in the United States. The employee said she was fired for pursuing an employment discrimination claim based on a disability, narcolepsy. The employee had taught mostly secular subjects but also taught religion classes and attended chapel with her class. The School said she was serving as a minister and was fired for violating religious doctrine by pursuing litigation rather than trying to resolve her dispute within the church. The S.Ct. concluded that the employee was a minister for the purposes of the Civil Rights Act’s ministerial exception, dismissing the suit and claim for damages, saying that churches and other religious groups must be free to choose and dismiss their leaders without government interference.

XIII. EQUAL PAY ACT.

- A. Prohibits compensation discrimination based on sex and is applicable to both men and women. 29 U.S.C. § 206(d)—part of the Fair Labor Standards Act; *see also*, 29 C.F.R. Part 1620.

- B. “No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to

- C. (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, that an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.” 29 U.S.C. § 206(d)(1).

- D. EEOC Regulations on Equal Pay Act—29 C.F.R. Part 1620.
 - 1. The equal work standard does not require that compared jobs be identical, only that they be substantially equal. 29 C.F.R. § 1620.13(a).

 - 2. What constitutes equal skill, equal effort, or equal responsibility cannot be precisely defined. In interpreting these key terms of the statute, the broad

remedial purpose of the law must be taken into consideration. The terms constitute separate tests, each of which must be met in order for the equal pay standard to apply. It should be kept in mind that "equal" does not mean identical. Insubstantial or minor differences in the degree or amount of skill, or effort, or responsibility required for the performance of jobs will not render the equal pay standard inapplicable. 29 C.F.R. § 1620.14(a).

a. Equal Skill. Skill includes consideration of such factors as experience, training, education, and ability. It must be measured in terms of the performance requirements of the job. 29 C.F.R. § 1620.15(a).

b. Equal Effort. Effort is concerned with the measurement of the physical or mental exertion needed for the performance of a job. Job factors which cause mental fatigue and stress, as well as those which alleviate fatigue, are to be considered in determining the effort required by the job. Effort encompasses the total requirements of a job. 29 C.F.R. § 1620.16(a).

c. Equal Responsibility. Responsibility is concerned with the degree of accountability required in the performance of the job, with emphasis on the importance of the job obligation. 29 C.F.R. § 1620.17(a).

d. Working Conditions. The term "similar working conditions" encompasses two subfactors: surroundings and hazards. Surroundings measure the elements, such as toxic chemicals or fumes, regularly encountered by a worker, their intensity and their frequency. "Hazards" take into account the physical hazards regularly encountered, their frequency and the severity of injury they can cause. The phrase "working conditions" does not encompass shift differentials. 29 C.F.R. § 1620.18(a).

3. Red Circle Rates. The term "red circle" rate is used to describe certain unusual, higher than normal, wage rates which are maintained for reasons unrelated to sex.

a. An example of bona fide use of a "red circle" rate might arise in a situation where a company wishes to transfer a long-service employee, who can no longer perform his or her regular job because of ill health, to different work which is now being performed by opposite gender-employees.

- b. Under the 'red circle' principle the employer may continue to pay the employee his or her present salary, which is greater than that paid to the opposite gender employees, for the work both will be doing. Under such circumstances, maintaining an employee's established wage rate, despite a reassignment to a less demanding job, is a valid reason for the differential even though other employees performing the less demanding work would be paid at a lower rate, since the differential is based on a factor other than sex. 29 C.F.R. § 1620.26(a).

4. Prima Facie Case.

- a. To establish her prima facie case, a plaintiff "bears the burden of showing that she (1) received lower pay than a male co-employee (2) for performing work substantially equal in skill, effort, and responsibility under similar working conditions." *Strag v. Board of Trustees*, 55 F.3d 943, 948 (4th Cir. 1995)." Additionally, the plaintiff must identify a particular male "comparator" for purposes of the inquiry, and may not compare herself to a hypothetical or "composite" male." *Id.* A plaintiff cannot merely make conclusory allegations that she performed comparable work. See *Soble v. University of Md.*, 778 F.2d 164, 167 (4th Cir. 1985).
- b. Instead, to survive summary judgment, she must produce evidence creating a genuine issue of material fact not only that she made lower wages than a male comparator, but also that she performed work that was substantially equal in skill, effort, and responsibility to her comparator under similar working conditions. See *Strag*, 55 F.3d at 950.
- c. Plaintiff must demonstrate specific facts on these issues, *Id.* at 951, and make the comparison factor-by-factor with the male comparator. *Houck v. Virginia Polytechnic Inst.*, 10 F.3d 204, 206 (4th Cir. 1993). The jobs do not have to be identical but must be "substantially equal" or "have a common core of tasks." *Brinkley-Obu v. Hughes Training, Inc.*, 36 F.3d 336, 351 (4th Cir. 1994).

5. An Equal Pay Act case may be commenced within two years after the cause of action accrues, except that a claim arising out of a willful violation may be

commenced within three years. 29 U.S.C. § 255(a).

6. A finding of liability under the Equal Pay Act does not support a finding of discrimination under Title VII absent a specific finding of intentional discrimination. *Meeks v. Computer Assocs. Int'l*, 15 F.3d 1013 (11th Cir. 1994); see also *Fallon v. Illinois*, 882 F.2d 1206 (7th Cir. 1989). But see *Korte v. Diemer*, 909 F.2d 954, 957 (6th Cir. 1990) (jury verdict on EPA claim required finding for plaintiff on Title VII claim); *McKee v. Bi-State Development Agency*, 801 F.2d 1014, 1018-19 (8th Cir. 1986); *Kouba v. Allstate Insurance Co.*, 691 F.2d 873, 875 (9th Cir. 1982); 29 C.F.R. §
7. 1620.27. EEOC treats compensation discrimination allegations, based on sex, as alleging a violation under both Title VII and the EPA, subject to statutory requirements such as timeliness. See 29 C.F.R. Part 1620.27.
8. National Security. See EEOC's Policy Guidance on the Use of the National Security Exception Contained in § 703(g) of Title VII of the Civil Rights Act of 1964, *as amended* (1989).
9. Title VII does not prohibit termination, or refusal to hire or refer for jobs where an individual does not meet the requirements for a position that are imposed in the interest of national security under any security program in effect under statute or Executive Order. The respondent must affirmatively establish that the security clearance is required for the position under a national security program pursuant to statute or Executive Order.
10. The Commission can review whether the grant, denial, or revocation of a security clearance was conducted in a discriminatory manner. Thus, the Commission can review whether procedural requirements in making security clearance determinations were followed without regard to an individual's protected status. However, the Commission is precluded from reviewing the substance of the security clearance determination or the security requirement under *any* of the EEO statutes.

XIV. REMEDIAL ACTIONS. 29 C.F.R. § 1614.501.

- A. Nondiscriminatory Placement. When an agency, or the Commission, in an individual case of discrimination, finds that an applicant or an employee has been discriminated against, the agency shall provide full relief which shall include...an unconditional offer to each identified victim of discrimination of placement in the position the person would have occupied but for the discrimination suffered by

that person, or a substantially equivalent position

- B. Back Pay. Reduced by interim earnings (duty to mitigate damages). Employee must be ready, willing, and able to work to be entitled to back pay. *Miller v. Marsh*, 766 F.2d 490 (11th Cir. 1985). Back pay liability under Title VII or the Rehabilitation Act is limited to two years prior to the date the discrimination complaint was filed.
- C. Front Pay. *Shore v. Federal Express Corp.*, 42 F.3d 373 (6th Cir. 1994). As general rule, reinstatement into an appropriate position is preferred to award of front pay. Three circumstances where front pay may be awarded in lieu of reinstatement: (1) where no position is available, (2) where subsequent working relationship would be antagonistic, or (3) where employer has record of long-term resistance to anti-discrimination efforts. *Finlay v. Postmaster General*, 97 FEOR 3144 (April 29, 1997). Front pay awards are not an element of compensatory damages within the meaning of Civil Rights Act of 1991, and are not subject to Act's statutory cap on compensatory damages (see *infra*). *Pollard v. E.I du Pont de Nemours & Co.*, 532 U.S. 843 (2001). Note that the time between judgment and reinstatement is considered front pay.
- D. Expunge from the agency's records any adverse materials relating to the discriminatory employment practice.
- E. Full opportunity to participate in the employee benefit denied (e.g., training, preferential work assignments, overtime scheduling).
- F. Fees and costs. Attorney fees or costs shall apply to allegations of discrimination prohibited by Title VII and the Rehabilitation Act. Attorney fees are normally payable only for work beginning at formal complaint stage. However, attorney fees will be payable for work performed during *pre-complaint* process where the Commission affirms an administrative judge's finding that an agency has not implemented. 29 C.F.R. § 1614.501(e). [Note: Attorney fees are not available in the administrative process for Age Discrimination in Employment Act and Equal Pay Act claims.]
 - 1. Finding of discrimination raises a presumption of entitlement to an award of attorney's fees.
 - 2. Only parties who obtain judgments on the merits of their claim or court-

ordered consent decrees in their favor can receive attorney's fees (costs still available). *Warren v. Dep't of the Army*, 103 FEOR 394 (May 7, 2003).

3. Attorney's fees or costs shall be paid by the agency.
 4. Attorney's fees allowable only for the services of members of the Bar, and law clerks, paralegals or law students under the supervision of members of the Bar.
 5. No award is allowable for the services of any employee of the Federal Government.
- G. Additional relief under the Civil Rights Act of 1991.
1. Compensatory Damages.
 - a. Limited to \$300,000 above other relief (cap does not include back pay, front pay, past pecuniary losses, attorney fees, or lost benefits). Assessed by EEOC. *West v. Gibson*, 527 U.S. 212 (1999) (EEOC has authority to require federal agencies to pay compensatory damages when they discriminate).
 - b. Not payable in ADEA (age discrimination) cases. The 1991 Civil Rights Act amended only Title VII and the Rehabilitation Act in terms of damages.
 - c. Not payable in Rehabilitation Act cases when agency made *good faith efforts* to reasonably accommodate.
 - d. Not payable in *disparate impact* cases. 42 U.S.C. § 1981a(a)(1).
 - e. A properly payable compensatory damages award issued by the EEOC must meet two standards: 1) It must not be "monstrously excessive" standing alone; and 2) it must be consistent with awards made in similar cases. *Winston v. Dep't of Agric.*, 100 FEOR 3145 (2000).
 - f. *Looney v. Dep't of Homeland Security*, 105 FEOR 456 (May 19,

2005). After a finding of retaliatory discrimination, an EEOC Administrative Judge (AJ) awarded complainant \$195,000 in non-pecuniary compensatory damages due to the emotional suffering by complainant as a result of the retaliatory conduct. Complainant suffered from bouts of crying; humiliation; depression; destruction of her spirit and confidence; feelings of having no purpose in life; fluctuating-weight problems; rashes; anxiety; nightmares relating to her supervisor; difficulty coping with life; being tense and unable to sleep when next to her husband in bed; and disinterested in sexual intercourse. In upholding the AJ's award, the EEOC noted its precedent that evidence from a health care professional was not a mandatory prerequisite for recovery of compensatory damages for emotional distress.

- g. *Glockner v. Dep't of Veterans Affairs*, 105 FEOR 66 (2004). \$200,000 nonpecuniary damages for harassment based on religion (Jewish) and reprisal taking place over several years, resulting in severe migraines, depression, physical and emotional distress, and harm to reputation.
- h. *DeJohn v. United States Postal Serv.*, 104 FEOR 388 (2004). \$95,000 nonpecuniary damages for exacerbation of symptoms of medical condition due to agency's failure to provide a chair as reasonable accommodation.

- 2. Jury trials. In any case where the plaintiff seeks compensatory damages and takes case to Federal District Court (except ADEA).
- 3. Prejudgment interest may be available in some cases. See *Brown v. Secretary of the Army*, 918 F.2d 214 (D.C. Cir. 1990); *Edwards v. Lujan*, 40 F.3d 1152, 1154 (10th Cir. 1994); *Wolf v. Bowles*, 57 F.3d 407, 410 (4th Cir. 1995). But see *Arneson v. Callahan*, 128 F.3d 1243 (8th Cir. 1997). The EEOC position is that interest on back pay is to be included in the back pay computation where sovereign immunity has been waived, and that the 1987 amendments to the Back Pay Act provided a limited waiver of sovereign immunity against the payment of prejudgment interest on back pay awards in Title VII cases where the employee meets other requirements of the Act. There is no waiver of sovereign immunity, and thus no prejudgment interest, in Age Discrimination in Employment Act cases. See *Gross v. Principi*, 102 FEOR 10482 (2001); 29 C.F.R. § 1614.501(c)(1).

CHAPTER H

Equal Employment Opportunity Practice and Procedure

TABLE OF CONTENTS

I.	REFERENCES.....	2
II.	NONMIXED CASES.....	3
III.	MIXED CASES.....	19
IV.	CLASS COMPLAINTS.....	23
V.	RIGHT TO REPRESENTATION.....	24
VI.	OFFICIAL TIME.....	24
VII.	EXHAUSTION OF ADMINISTRATIVE REMEDIES.....	25
VIII.	JUDGMENT FUND.....	25
IX.	CONTRACTOR EMPLOYEES.....	27
X.	CONCLUSION.....	29
	ENCLOSURE 1.....	30

Administrative and Civil Law Department
The Judge Advocate General's Legal Center and School

Equal Employment Opportunity Practice and Procedure

I. REFERENCES.

A. Primary.

1. Title VII, Civil Rights Act, 42 U.S.C. §§ 2000e - 2000e-17.
2. Age Discrimination in Employment Act; 29 U.S.C. § 633a.
3. Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 790-794, and modified by the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213. In 1992, the Rehabilitation Act (29 U.S.C. § 791(g)) was amended to make standards that apply under Title I of the Americans with Disabilities Act (42 U.S.C. § 12111 *et seq.*) and the provisions of §§ 501, 504, and 510 of the Americans with Disabilities Act (42 U.S.C. §§ 12201-204, 12210) applicable in Rehabilitation Act cases to determine whether non-affirmative action employment discrimination occurred. These provisions primarily relate to discrimination based on disability and reasonable accommodation.
4. Equal Pay Act, 29 U.S.C. § 206(d).
5. Civil Rights Act of 1991, Pub. L. No. 102-166 (codified at scattered sections of 42 U.S.C.).
6. Civil Service Reform Act of 1978, 5 U.S.C. § 7702 [Merit Systems Protection Board “mixed cases”].
7. 29 C.F.R. Part 1614 [Equal Employment Opportunity Commission (EEOC) federal sector complaints processing].
8. AR 690-600; AFI 36-1201; SECNAVINST 12720.5A; MCO 12713.6A.

B. Secondary.

1. Representing Agencies and Complainants Before the EEOC, Hadley, Laws, and Riley, <http://deweypub.com>. [Book's focus is hearing practice].
2. A Guide to Federal Sector Equal Employment Law & Practice, Ernest C. Hadley, <http://deweypub.com>. Updated annually. [Book's focus is substantive law].
3. Effective Summary Judgment Motions, Hadley, Laws, and Murphy, <http://deweypub.com>. [Focusing upon EEOC practice].
4. Motions Practice Before the MSPB and the EEOC, Hadley and Tuck, <http://deweypub.com>.
5. Compensatory Damages and Other Remedies in Federal Sector Employment Discrimination Cases, Gilbert, <http://deweypub.com>.
6. A Guide to Federal sector Disability Discrimination Law and Practice, Hadley, Laws, and Broida, <http://deweypub.com>.
7. EEOC Management Directive 110.
8. EEOC Handbook for Administrative Judges.
9. EEOC: www.eeoc.gov.

II. ADMINISTRATIVE COMPLAINT PROCESS AND PROCEDURES—NONMIXED CASES.

A. Informal Stage: Employee Contacts EEO Counselor.

1. Timing—Aggrieved persons who believe they have been discriminated against on the basis of race, color, religion, sex, national origin, age, physical or mental disability, and/or reprisal in an employment matter must initiate contact with an EEO Counselor within 45 days of the agency's alleged act of discrimination, or, if the claim involves a personnel action, within 45 days of the effective date of the action. 29 C.F.R. § 1614.105 (a)(1) and AR 690-600, Chapter 3.

1. Commencement of 45-day period.
 - (1) Personnel action—effective date of action.
 - (2) Event not constituting a personnel action—date individual knew or reasonably should have known of discriminatory event.
2. Administrative timeliness requirements are construed as statutes of limitations that are subject to waiver, estoppel, and equitable tolling. *See, e.g., Saltz v. Lehman*, 672 F.2d 207 (D.C. Cir. 1982).
3. Tolling of 45-day period. 29 C.F.R. § 1614.105(a)(2). Initial contact beyond 45 days will be permitted if the employee was:
 - (1) Not notified of and was otherwise not aware of the 45-day limit;
 - (2) Did not know and reasonably should not have known that the discriminatory matter or personnel action occurred; or
 - (a) Reasonable Person – Reasonable Suspicion Standard. Complainant will have to show that in the circumstances, a reasonable person would not have been aware of the alleged discrimination. Focus is on when complainant first had reasonable suspicion the action was based on discriminatory reasons. *Royster v. Dep't of Treasury*, 91 FEOR 23811 (September 6, 1991).
 - (3) That despite due diligence was prevented by circumstances beyond his control from contacting the counselor within the time limits, or for other reasons considered sufficient by the agency or the Commission.
4. Posting Requirements. 29 C.F.R. § 1614.102(b)(5)&(7). Make written materials available to all employees and applicants informing them of the variety of equal employment opportunity programs and administrative and judicial remedial procedures available to them and post such written materials throughout the workplace.

- (1) Time Limit Notification. *Hendley v. Small Business Admin.*, 104 FEOR 22 (2003). The agency improperly dismissed the complainant's age discrimination complaint after determining he did not contact an EEO counselor in a timely manner. Although a complainant generally is required to seek EEO counseling within 45 days of an alleged discriminatory event, the time period can be extended if the complainant successfully claims he was unaware of the time limit. In order to rebut such a claim, an agency must be prepared to provide specific evidence the complainant had actual or constructive notice of the time limit. Generally, this can be shown by establishing that, during the time period in question, there were EEO posters in the complainant's workplace outlining the proper procedure for contacting an EEO counselor. The agency failed to make this showing.
 - (2) *Dunham v. U.S. Postal Serv.*, 100 FEOR 1011 (1999). The EEOC remanded the complainant's case for a supplemental investigation after noting his argument that he was unaware of the time limit for seeking EEO counseling. In making its decision, the EEOC determined that the agency failed to provide specific evidence of its EEO postings in order to show that the complainant had constructive notice of the time limit.
5. Waiver of Time Limit. *Oaxaca v. Roscoe*, 641 F.2d 386 (5th Cir. 1981). *Robbins v. Dep't of Army*, 93 FEOR 3179 (April 1, 1993) (Time limit waived for reservist serving in Operation Desert Storm).
- (1) In most circuits, mere receipt and investigation of a (late) complaint does not waive defense of untimely exhaustion of administrative remedies. See *Boyd v. U.S. Postal Serv.*, 752 F.2d 410, 414 (9th Cir. 1985); *Bowden v. U.S.*, 106 F.3d 433, 438 (D.C. Cir. 1997); *Rowe v. Sullivan*, 967 F.2d 186, 191 (5th Cir. 1992); *Blount v. Shalala*, 32 F. Supp. 2d 339, 341 (D. Md. 1999), *aff'd mem.*, 199 F.3d 1326 (4th Cir. 1999).

(2) If you accept an untimely (or *potentially* untimely) complaint for investigation, make sure the acceptance letter/memo preserves the issue. See *Ester v. Principi*, 250 F.3d 1068 (7th Cir. 2001) (When an agency decides the merits of an EEO complaint during the administrative process and does not address the question of timeliness, the agency waives a timeliness defense in a subsequent lawsuit); see also *Bowden v. United States*, 106 F.3d 433, 438-39 (D.C. Cir. 1997) (holding that when agency decides a case on the merits without mentioning timeliness, its failure to raise the issue of timeliness in the administrative process may lead to waiver of a timeliness defense).

6. Continuing Violation. The continuing violation theory suspends the normal 45-day period for contacting an EEO counselor and allows complainants to assert otherwise untimely claims so long as they also allege discrimination occurring within the 45-day limitations period.

(1) EEOC. Complainant's notice of discrimination outside the limitations period does not preclude the continuing violation theory. The running of the period for initiating a Title VII complaint starts from the most recent occurrence of the alleged discrimination and not from the first occurrence. *Anisman v. Dep't of Treasury*, 101 FEOR 3069 (April 12, 2001).

(2) The EEOC reversed the agency's decision to dismiss the complainant's case for untimely EEO counselor contact after finding the issues were timely under the continuing violation theory, since the denial of a career-ladder promotion occurs each and every day after the date of eligibility that the promotion is not granted. *Long v. Dep't of Transportation*, 100 FEOR 1204 (2000).

(3) Timeliness. Complainant must allege facts that are sufficient to indicate that s/he may have been subjected to an ongoing unlawful employment practice which continued into the 45-day period for EEO counselor contact. See *e.g.*, *Redmon v. Office of Personnel Mgmt.*, 101 FEOR 3003 (August 25, 2000) (sufficiency of factual allegations where an ongoing discriminatory system or policy is alleged).

- (4) Reasonable Suspicion. Evidence that a complainant had, or should have had, a reasonable suspicion of discrimination more than 45 days prior to initiating EEO counselor contact, will not preclude acceptance of an otherwise timely claim of ongoing discrimination. *Howard-Grayson v. U. S. Postal Serv.*, 100 FEOR 3119 (December 3, 1999) (improper fragmentation of a continuing violation claim); accord *Treschitta v. Dep't of Transportation*, EEOC Request No. 05990600 (January 13, 2000) (timely hostile work environment claim involving incidents spanning an 18 month period).
- (5) Supreme Court and Continuing Violations. In 2002, the Court distinguished between hostile work environment claims and claims involving discrete acts of discrimination (such as discharge, failure to promote, denial of transfer, or failure to hire). *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002).
- (a) Discrete Acts. Title VII precludes recovery for discrete acts of discrimination that occur outside the statutory time period (the 45 days in which to contact an EEO counselor). “Discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges. Each discrete discriminatory act starts a new clock for filing charges alleging that act.” *Morgan* at 2072.
- (b) Hostile Environment. Involves repeated conduct – “a series of separate acts that collectively constitute one unlawful employment practice.” Hostile work environment claims do not turn on single acts but on an aggregation of hostile acts extending over a period of time. The unlawful employment practice that triggers the statute of limitations occurs not on any particular day, but over a series of days or perhaps years. Thus, the statute of limitations is satisfied as long as the plaintiff files a charge within [45 days] of one of the many acts that, taken together, created the hostile work environment.

2. Counselor Actions. 29 C.F.R. § 1614.105(b).

1. Initial Interview.
 - (1) Advise complainant. Counselors must advise individuals in writing of their rights and responsibilities including the right to request a hearing or an immediate final decision after an investigation by the agency in accordance with § 1614.108(f).
 - (2) Counselors shall advise aggrieved persons that, where the agency agrees to offer Alternative Dispute Resolution (ADR) in the particular case, they may choose between participation in the ADR program and the counseling activities. § 1614.105(b)(2).
 - (a) Where complainant chooses to participate in ADR, the pre-complaint processing period shall be 90 days. § 1614.105(f).
 - (b) The ADR election must be made in writing and the form will be attached to the EEO Counselor's report. The aggrieved person's election to proceed through counseling or ADR is final.
 - (3) Gather facts from complainant.
 - (4) Identify witnesses who may have direct knowledge of the alleged events.
2. Counselor inquiry, including interview with alleged discriminating official. Counselor reviews applicable records and interviews the alleged discriminating officials or co-workers to find out the reasons for the action taken.
3. Final Interview.
 - (1) Time—within 30 days of contact. This period may be extended for up to an additional 60 days if both the employee and the agency agree. Note: If the aggrieved person chooses to participate in an ADR procedure, the pre-complaint processing period shall be 90 days. 29 C.F.R. § 1614.105(d)-(f).

- (2) Counselor should discuss what occurred during the EEO counseling process in terms of attempts at resolution. EEOC MD-110, Section VI, Paragraph D.
 - (3) Notice of right to file formal complaint. Advise the complainant (also in writing) of the right to file any formal complaint with the EEO Officer within 15 calendar days of receipt of the final interview notice. (Air Force: can also file with local Commander. AFI 36-1201, Section B, Paragraph 2).
 - (4) A postmark dated within the requisite 15 days will be evidence of timely filing. EEOC MD-110, Section VI, Paragraph D.
 - (5) Counselor must **not** indicate whether s/he believes the discrimination complaint has merit. EEOC MD-110, Section VI, Paragraph D. The counselor shall not attempt in any way to restrain the aggrieved person from filing a complaint. 29 C.F.R. § 1614.105(g).
4. Final Report. Counselor must submit written report within 15 days to the EEO Officer and the aggrieved person concerning the issues discussed and actions taken during counseling. 29 C.F.R. § 1614.105(c).
- (1) Air Force: Submit a narrative report to the Chief EEO Counselor within 5 calendar days of the date the formal complaint is filed. AFI 36-1201, Section A, Paragraph 1.
 - (2) Army: EEO counselor will submit a written report of all actions taken during the inquiry and of the information provided to management and the aggrieved to the EEO officer within 5 days of completion of counseling. AR 690-600, paragraph 3-9h.
5. Identity of Complainant. The Counselor shall not reveal the identity of an aggrieved person who consulted the Counselor, except when authorized to do so by the aggrieved person, or until the agency has received a discrimination complaint from that person involving that same matter. 29 C.F.R. § 1614.105(g).

B. Formal Stage.

1. Written complaint to EEO Officer. 29 C.F.R. § 1614.106. Complaint must contain a signed statement from the person claiming to be aggrieved or that person's attorney. This statement must be sufficiently precise to identify the aggrieved individual and the agency and to describe generally the action(s) or practice(s) that form the basis of the complaint.
 1. Timing—within 15 days of final interview with EEO Counselor.
 2. Amendment. Complainant may amend at any time prior to conclusion of investigation (like or related only). 29 C.F.R. §1614.106(d). May amend on motion to judge after request for hearing. Id.
 3. Consolidation. Agencies must consolidate for joint processing two or more complaints of discrimination filed by the same complainant, after appropriate notification is provided to the parties. 29 C.F.R. §1614.106. Section 1614.606 permits, but does not require, the consolidation of complaints filed by *different complainants* that consist of substantially similar allegations or allegations related to the same matter.
 4. Dismissal of complaint. Prior to a request for a hearing in a case, the agency can dismiss an entire complaint for the following reasons:
 - (1) Failure to state a claim under 29 C.F.R. § 1614.103. "The Commission has held that a remark or comment, unaccompanied by concrete action, is not a direct and personal deprivation sufficient to render an individual aggrieved. See *Simon v. U.S. Postal Service*, EEOC Request No. 05900866 (October 3, 1990). The Commission holds here that the absence of a remark or comment, also unaccompanied by concrete action, similarly does not cause a direct and personal deprivation sufficient to render an individual aggrieved." Wesley W. Kelly, Appellant,, EEOC DOC 01941599, 1994 WL 1755730, at *3 (Mar. 3, 1994).
 - (a) *But see, Eley v. Dep't of Navy*, 106 FEOR 294 (March 3, 2005) (racially offensive remarks and disparaging ethnic jokes state a claim of hostile work environment); see also *Frascella v. Dep't of Navy*, EEOC Appeal No. 01A45038 (November 24, 2004) (numerous incidents of alleged harassment by a supervisor state a claim of

hostile work environment).

- (b) Statements by agency officials as part of settlement discussions are not actionable. *Figueroa v. U.S. Postal Serv.*, 105 FEOR 176 (December 23, 2004).
- (2) Identical complaint. 29 C.F.R. § 1614.107(a)(1). Complaint is pending before or has been decided by the agency or EEOC.
- (3) Not against the proper agency. 29 C.F.R. § 1614.107(a)(1), § 1614.106(a).
- (4) Untimely—at either formal or informal stage 29 C.F.R. § 1614.107(a)(2). *Hovell v. Dep't of Navy*, EEOC Appeal No. 01A43005 (August 9, 2004) (Failure to address reasonable accommodation request is a recurring violation that repeats each day the accommodation is not provided).
 - (a) Contact with EEO counselor was timely where made via email within 45-days of alleged discrimination. *Pough v. Dep't of Transportation*, EEOC Appeal No. 01A41671 (December 22, 2004).
 - (b) Time spent on active military duty is excluded when computing time limit for contacting EEO counselor. *Ulmer v. U.S. Postal Service*, 105 FEOR 120 (November 16, 2004).
 - (c) Receipt of written notice of right to file a formal complaint triggers the 15 day time limit. Oral notice prior to that is immaterial. *Brown v. Dep't of Army*, EEOC Appeal No. 01A43465 (October 22, 2004). Time periods run from service on attorney of record when complainant is represented. *Blakemore v. Dep't of Navy*, EEOC Appeal No. 01A43465 (2004).
- (5) Pending civil action in a United States District Court in which the complainant is a party provided that at least 180 days have passed since the filing of the administrative complaint. 29 C.F.R. § 1614.107(a)(3).

- (6) Raised in negotiated grievance procedure that permits allegations of discrimination or in an appeal to the Merit System Protection Board (MSPB). 29 C.F.R. § 1614.107(a)(4); *McGrew v. Dep't of Air Force*, 105 FEOR 219 (2005).
 - (7) Issue is moot, or issue is a proposal to take a personnel action or other preliminary step to taking a personnel action. 29 C.F.R. § 1614.107(a)(5). *Musgrow v. Dep't of Navy*, EEOC Appeal No. 01A30383 (May 26, 2004) (While a PIP may be a preliminary step to a personnel action and properly dismissed, this provision will not apply if complainant alleges the PIP was issued for the purpose of harassment based on a prohibited reason. *Conclusion*: viability of complaint will turn on the complainant's skill (or luck) in pleading their claim.) Complaint cannot be dismissed as moot where complainant has requested compensatory damages. *Anderson v. Dep't of Air Force*, EEOC Appeal No. 01A44943 (December 13, 2004).
 - (8) Complainant cannot be located. 29 C.F.R. § 1614.107(a)(6).
 - (9) Failure to prosecute. 29 C.F.R. § 1614.107(a)(7). Failure to cooperate where complainant failed to provide requested information to clarify complaint. *Dipple v. Dep't of Defense*, EEOC Appeal No. 01A41939 (November 17, 2004). But see *McLain v. Dep't of Army*, 107 FEOR 182 (January 30, 2004) (dismissal improper where formal complaint and counselor's report contained sufficient information to process complaint).
 - (10) Spin-off complaints. Complaint alleges dissatisfaction with processing of a previously filed complaint. 29 C.F.R. § 1614.107(a)(8).
 - (11) Clear pattern of abuse of EEO process. 29 C.F.R. § 1614.107(a)(9). Dismissal of 10 consolidated EEO complaints on grounds of abuse of process affirmed. *Abell v. Dep't of Interior*, 104 FEOR 409 (2004).
- 5. Administrative Judges (AJ) may dismiss complaints for the foregoing reasons on their own initiative, after notice to the parties, or upon an agency's motion to dismiss a complaint. 29 C.F.R. § 1614.109(b).
 - 6. Agency may **no longer** dismiss for failure to accept an offer of full relief.

7. Appeal of dismissal. A complaint dismissed in whole by the agency may be appealed, within 30 days of receipt, to the EEOC's Office of Federal Operations (EEOC-OFO) 29 C.F.R. § 1614.402(a).
8. Partial Dismissals. There is no longer an interlocutory appeal right to the EEOC-OFO on partial dismissals. When an agency dismisses some but not all of the claims in a complaint, it must notify the complainant in writing and must explain the rationale for the decision and shall notify the complainant that those claims will not be investigated. This determination is reviewable by the EEOC Administrative Judge (AJ) if a hearing is requested on the remainder of the complaint. The AJ may determine to supplement the file through testimony or other means if he determines the dismissed issues were dismissed in error. Issue is not appealable until final action is taken on the remainder of the complaint. 29 C.F.R. § 1614.107(b).
9. Investigation. Civilian Personnel Management Service (CPMS) Investigations and Resolutions Division (IRD) investigator will conduct series of interviews or hold a fact-finding conference resulting in a report of investigation. AR 690-600, para. 4-20; AFI 36-1201, para. 2-3.
10. Timing of Investigation. Agencies must complete the investigation within 180 days of the filing of the complaint, or where a complaint was amended, within the earlier of 180 days after the last amendment to the complaint or 360 days after the filing of the original complaint (with a possible extension of up to 90 days if the employee and agency agree in writing). 29 C.F.R. §§ 1614.108(f) and 1614.108(e).
11. Complainant decides on course of action—within 30 days of receipt of the investigative file. 29 C.F.R. § 1614.108(f).
 - (1) Request a final decision from the agency head based on the record.
 - (2) Request a hearing and decision from an EEOC administrative judge.

2. EEOC Hearing. 29 C.F.R. § 1614.109.

1. Prehearing Issues.

- (1) Request for Hearing. 29 C.F.R. 1614.108(g). Complainants make requests for a hearing directly to the EEOC office indicated in the agency's acknowledgment letter. The complainant must send a copy of the request for a hearing to the agency EEO office.
- (2) Dismissals. 29 C.F.R. § 1614.109(b). AJ may dismiss complaint on own initiative or upon agency motion.
- (3) Offer of Resolution. 29 C.F.R. 1614.109(c).
 - (a) Timing of offer if represented by an attorney. Any time after the filing of the written complaint but not later than the date an AJ is appointed to conduct a hearing.
 - (b) Timing of offer whether represented by an attorney or not. Any time after the parties have received notice that an AJ has been appointed to conduct a hearing, but not later than 30 days prior to the hearing.
 - (c) Content.
 - (i) Written
 - (ii) Notice of Consequences. If the complaining party does not accept the offer and ultimately obtains no more relief than what was offered, no attorney's fees or costs will be payable for work done after the offer was not accepted.
 - (iii) Timing for Acceptance. 30 days from receipt of the offer of resolution.
- (4) Discovery. 29 C.F.R. § 1614.109(d). The parties may engage in discovery before the hearing. AJ may limit the quantity and timing of discovery. Evidence may be developed through interrogatories, depositions, and requests for admissions, stipulations or production of documents.

- (a) Grounds for Objection. A party may object to requests for discovery that is irrelevant, over burdensome, repetitious, or privileged.
- (b) Agency attorneys should aggressively use discovery to prove their case.
 - (i) Requests for admissions very effective in proving case (e.g., Admit that “agency official” had no knowledge of your prior EEO complaint filed on DATE).
 - (ii) Interrogatories are very effective in covering matters that may not have been addressed during the formal investigation or were poorly covered (e.g., Identify all facts showing that “agency official” knew of your prior EEO complaint (Agency No.) on or before DATE when he decided to remove you from Federal employment).
 - (iii) Requests for production of documents are the most common and effective way of gathering complainant’s records that may be used to substantiate the damages portion of the claim (e.g., Produce all medical records from any health care provider or social worker that has treated you for your condition of depression).
 - (iv) Depositions are the litigator’s friend. Unless you are extremely positive that the administrative judge will grant your motion for summary judgment, I strongly encourage you to depose at least the complainant. An excellent resource for deposition skills is THE EFFECTIVE DEPOSITION, REV. 2D ED., MALONE & HOFFMAN and published by the National Institute of Trial Advocacy (www.nita.org).

- 2. Decisions Without Hearing. 29 C.F.R. § 1614.109(g). The parties may limit the issues for hearing by filing a statement at least 15 days before the hearing showing that there is no genuine dispute as to some

or all material facts. The AJ can decide to issue a decision without holding a hearing (if facts are not in genuine dispute). 29 C.F.R. § 1614.109(g)(3).

3. Hearing Procedures.

(1) Evidence. 29 C.F.R. § 1614.109(e). The AJ shall receive into evidence information or documents relevant to the complaint. Rules of evidence shall not be applied strictly, but the AJ shall exclude irrelevant or repetitious evidence.

(2) Witnesses. 29 C.F.R. § 1614.109(e). Agencies shall provide for the attendance at a hearing of all **employees** approved as witnesses by an AJ.

(3) Alternatives to testimony. Written statement under penalty of perjury. 29 C.F.R. § 1614.109(f)(2).

(4) Don't forget the basics! Agency held liable when it failed to put into evidence that it had a strong, widely disseminated policy against discrimination **and** that it had an effective complaint procedure in place. *Parker v. Dep't of Army*, 95 FEOR 3214 (June 8, 1995).

4. Record of hearing. 29 C.F.R. § 1614.109(h). The hearing shall be recorded and the agency shall arrange and pay for verbatim transcripts.

5. Decision. 29 C.F.R. § 1614.109(i). Within 180 days of receipt of the complaint file from the agency, the AJ will issue a decision on the complaint, and will order appropriate remedies and relief where discrimination is found.

C. Final Agency Action After AJ Decision (With or Without Hearing). 29 C.F.R. § 1614.110. When an AJ has issued a decision, the agency shall take final action on the complaint by issuing a final order within 40 days of receipt of the hearing file and the AJ's decision.

1. Content of Final Order. 29 C.F.R. § 1614.110(a). The final order will indicate whether or not the agency will implement the AJ's decision. The final order shall also contain notice of the right to appeal to the EEOC, notice of the right to file a civil action in federal district court, and the applicable

time limits for appeals and lawsuits.

2. Agency Appeal of AJ Decision. 29 C.F.R. § 1614.403(d).

1. If the agency is not going to fully implement the AJ's decision, then it must simultaneously file an appeal to the EEOC-OFO. The agency's appeal brief in support of the appeal must be submitted to EEOC-OFO within 20 days of filing the notice of appeal.

2. Recap of agency appeal timelines.

(1) 40 days after AJ decision to issue final order and notice of appeal to EEOC.

(2) 20 days after notice of appeal to file appeal brief.

D. Final Agency Action When There is No AJ Decision. 29 C.F.R. § 1614.110(b). The agency will issue a final decision when it dismisses an entire complaint under 29 C.F.R. § 1614.107, receives a request from complainant for an immediate final decision or does not receive a reply to the notice issued under 29 C.F.R. § 1614.108(f).

1. Content of Final Decision. The final decision will consist of findings by the agency on the merits of each issue in the complaint, or, as appropriate, the rationale for dismissing any claims in the complaint and when discrimination is found, appropriate remedies and relief. The final decision shall also contain notice of the right to appeal to the EEOC, notice of the right to file a civil action in federal district court, and the applicable time limits for appeals and lawsuits.

2. Timing. Agency must issue final decision within 60 days of receiving notice that a complainant has requested an immediate decision from the agency (e.g., a decision without an AJ hearing).

E. Complainant's Appeal of Final Agency Action. 29 C.F.R. § 1614.402(a). Must appeal to EEOC-OFO within 30 days of receipt of a dismissal, final action or decision. Complainant's appeal brief must be filed with EEOC-OFO within 30 days of filing notice of appeal.

F. Other Appeal Requirements. 29 C.F.R. § 1614.403(a)-(f). Agency must submit the complaint file to the EEOC-OFO within 30 days of notice of complainant's

appeal or of filing agency appeal.

1. Any statement or brief in opposition to an appeal must be submitted to the EEOC-OFO and served on the opposing party within 30 days of receipt of the statement or brief supporting the appeal, or, if no statement or brief supporting the appeal is filed, within 60 days of receipt of the appeal.
 2. Format. The EEOC/OFO will accept statements or briefs in support of or in opposition to an appeal by facsimile provided they are no more than 10 pages long.
- G. Standard of Review on Appeal to EEOC-OFO. Decisions on appeal from agency's final action are based on *de novo* review, except factual findings in a decision by AJ are given *substantial evidence* standard of review.
- H. Request for Reconsideration. 29 C.F.R. § 1614.405. A decision issued by the EEOC-OFO is final unless the Commission reconsiders the case.
1. Timing of Request for Reconsideration. A party may request reconsideration within 30 days of receipt of a decision of the Commission.
 2. Grounds for Reconsideration.
 1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
 2. The decision will have a substantial impact on the policies, practices or operations of the agency.

III. ADMINISTRATIVE COMPLAINT PROCEDURES--MIXED CASES.

A. Initiating the process--Three possible options.

1. Negotiated grievance procedure. 29 C.F.R. § 1614.301(a). When a person is covered by a collective bargaining agreement that permits allegations of discrimination to be raised in a negotiated grievance procedure, a person wishing to file a complaint or a grievance on a matter of alleged employment discrimination must elect to raise the matter under either part 1614 or the negotiated grievance procedure, but not both.
2. EEOC mixed case complaint. 29 C.F.R. § 1614.302(a)(1). (EEO complaint

process minus hearing before EEOC AJ and appeal to EEOC). A mixed case complaint is a complaint of employment discrimination filed with a Federal agency based on race, color, religion, sex, national origin, age or handicap related to or stemming from an action that can be appealed to the Merit Systems Protection Board (MSPB). The complaint may contain only an allegation of employment discrimination or it may contain additional allegations that the MSPB has jurisdiction to address. 29 C.F.R. § 1614.302(a)(1).

3. MSPB mixed case appeal [Note: the initial claim filed with the MSPB is still termed an “appeal”]. 29 C.F.R. § 1614.302(a)(2). A mixed case appeal is an appeal initially filed with the MSPB that alleges that an appealable agency action was effected, in whole or in part, because of discrimination on the basis of race, color, religion, sex, national origin, handicap or age. An appeal is mixed if the aggrieved employee alleges an action taken by the employer was effected wholly, or in part, because of employment discrimination based on race, color, religion, sex, national origin, age, or handicap. *Downey v. Runyon*, 160 F.3d 139 (2nd Cir. 1999).
- B. Electing the option. An aggrieved person may initially file a mixed case complaint with an agency or file a mixed case appeal on the same matter with the MSPB pursuant to 5 C.F.R. § 1201.151, but not both. An agency shall inform every employee who is the subject of an action that is appealable to the MSPB, and who has either orally or in writing raised the issue of discrimination during the processing of the action, of the right to file either a mixed case complaint with the agency or to file a mixed case appeal with the MSPB.
1. Election Irrevocable. An employee must choose between filing with the MSPB or the EEOC and the election of forum is irrevocable. *Archuleta v. Dep’t of Agric.*, 86 FEOR 20895 (1986).
 2. Statute of Limitations. The statute of limitations is tolled if the agency provides incorrect advice to an employee. Even assuming that the agency did not intentionally mislead appellant when it gave him incorrect advice, it is clear that the agency's advice was wrong; that appellant followed wrong advice when he filed his appeal with the MSPB; and that the agency did nothing after receiving the MSPB decision, which informed it that its prior advice was wrong. In these circumstances, we find that the limitations period for filing an appeal with the Commission was tolled as of the date appellant received the agency's final decision. *Jenkins v. Dep’t of Army*, 96 FEOR 3068 (1996); See, e.g., *Ong v. Dep’t of Army*, 88 FEOR 24568 (1988); *Martinez v. Orr*, 738 F.2d 1107, 1110 (10th Cir. 1984).
 3. Complaint Process. When a complainant elects to file a mixed case complaint under Title VII procedures, rather than file a mixed case appeal

with the MSPB, the procedures set forth above for nonmixed case processing shall govern the processing of the mixed case complaint with the following exceptions:

1. At the time the agency advises a complainant of the acceptance of a mixed case complaint, it shall also advise the complainant that:
 - (1) If a final decision is not issued within 120 days of the date of filing of the mixed case complaint, the complainant may appeal the matter to the MSPB at any time thereafter as specified at 5 C.F.R. § 1201.154(b)(2) or may file a civil action as specified at 29 C.F.R. § 1614.310(g), but not both; and
 - (2) If the complainant is dissatisfied with the agency's final decision on the mixed case complaint, the complainant may appeal the matter to the MSPB (not EEOC) within 30 days of receipt of the agency's final decision.
2. Upon completion of the investigation, the notice provided the complainant in accordance with 29 C.F.R. § 1614.108(f) will advise the complainant that a final decision will be issued within 45 days without a hearing.
3. At the time that the agency issues its final decision on a mixed case complaint, the agency shall advise the complainant of the right to appeal the matter to the MSPB (*not EEOC* - a final agency decision on a mixed complaint may be appealed to the MSPB, *but not* to the EEOC 29 C.F.R. § 1614.302(d)(1)(ii)) within 30 days of receipt and of the right to file a civil action as provided at 29 C.F.R. § 1614.310(a). When an agency issues a final decision on a mixed case complaint, the agency must inform the employee that she can appeal to the MSPB or file a civil action in district court. If the agency provides the employee with incorrect appeal rights, the MSPB likely will find that the employee had good cause if she files a late appeal. *Toyama v. Merit Systems Protection Bd.*, 481 F.3d 1361, (Fed. Cir. 2007).
4. Burden of Proof.
 1. An employee who processes a mixed complaint through the EEO process bears the burden of proving the action was based on a discriminatory motive. *Texas Dep't of Community Affairs v.*

Burdine, 450 U.S. 248, 253 (1981).

2. An employee who processes a mixed appeal through the MSPB process puts the burden of proving the legality of the action on the agency. The affirmative defense of proving discrimination still rests with the employee. 5 C.F.R. § 1201.56.

5. Appeal.
 1. A mixed appeal decided by the MSPB may be reviewed by the EEOC regarding the discrimination issue. *Phillips v. Dep't of Army*, 91 FEOR 3144 (1990).
 2. The EEOC must determine whether the decision of the MSPB, with respect to discrimination, constitutes an incorrect interpretation of any applicable law, rule, regulation, or policy directive or is not supported by the evidence in the record as a whole. *Williams v. Dep't of Housing and Urban Dev.*, 90 FEOR 24071 (1990).
 3. An appellant may not raise an allegation of discrimination for the first time when submitting a MSPB decision for review by the EEOC. *Loveland v. Dep't of Air Force*, 88 FEOR 20762 (1988).
 4. Special Panel if MSPB and EEOC decisions clash (mixed).
 - (1) In the event the EEOC seeks to overrule the MSPB on the discrimination issue the MSPB has the option of concurring with the EEOC or reaffirming its decision and invoking the Special Panel to decide the case. 29 C.F.R. § 1614.306.
 - (2) The Special Panel has determined that the MSPB can disagree with the EEOC only as to a misinterpretation of civil service law. *Ignacio v. U.S. Postal Serv.*, Special Panel No. 1, 86 FEOR 5055 (February 27, 1986).

6. File Civil Action in U.S. District Court. *De novo* review.
 1. A district court will review the MSPB determination of a non-discriminatory issue under a deferential standard, but will review the discrimination claim *de novo*. *Sloan v. West*, 140 F.3d 1255 (9th Cir. 1998).

2. An employee may appeal the decision of the MSPB of a mixed appeal to the EEOC, for a review of the discrimination issue, or to the appropriate district court. *Washington v. Garrett*, 10 F.3d 1421, 1428 (9th Cir. 1993).
3. An employee may file in U.S. District Court if 120 days have elapsed and the employee has not received a final decision from the MSPB on a mixed appeal. *Butler v. Dep't of Army*, 164 F.3d 634 (D.C. Cir. 1999).
4. If the employee files in District Court once the MSPB fails to reach a decision within 120 days, or under any other circumstance in which the District Court may hear the case under 5 U.S.C. § 7702 , the case shall be heard as a unit, including both discrimination and nondiscrimination complaints. *Ikossi v. Dep't of Navy*, 516 F.3d 1037 (D.C. Cir. 2008).

IV. ADMINISTRATIVE COMPLAINT PROCEDURES--CLASS COMPLAINTS.

- A. Class action complaints are filed when a large number of individuals who share a common protected characteristic seek to have addressed a discriminatory employment policy or practice that affects them all because of their shared protected group. A "class" is "a group of employees, former employees or applicants for employment who, it is alleged, have been or are being adversely affected by an agency personnel management policy or practice that discriminates against the group on the basis of their race, color, religion, sex, national origin, age" or disability. 29 C.F.R. § 1614.204(a)(1).
- B. A "class complaint" is "a written complaint of discrimination filed on behalf of a class by the agent of the class." 29 C.F.R. § 1614.204(a)(2).
- C. Requirement to exhaust administrative class procedures as a prerequisite to maintaining judicial class action.
- D. Significant difference in procedures for class complaints.

1. Class agent. A class agent is a member of the class who acts on behalf of the class during the processing of the class complaint. 29 C.F.R. § 1614.204(a)(3).
2. Heightened pleading requirement in formal complaint.
3. Preliminary role of administrative judge in determining propriety of class processing.

1. An EEOC AJ will dismiss a class complaint for any of the following: 1) It does not meet all the prerequisites for a class complaint listed at 29 C.F.R. 1614.204(a)(2) (i.e., numerosity, commonality, typicality, and adequacy of representation); 2) The allegations lack specificity and detail; 3) The complaint falls within any of the criteria for dismissal listed at 29 C.F.R. § 1614.107(a) (i.e., failure to state a claim, untimeliness, mootness, etc.); and 4) The representative unduly delayed in moving for class certification.

2. The EEOC AJ assigned to a class complaint can request additional information from the complainant or the agency in deciding whether to certify a class complaint. 29 C.F.R. § 1614.204(d)(3) - (4).

3. In considering a class complaint, it is important to resolve the requirements of commonality and typicality prior to addressing numerosity in order to "determine the appropriate parameters and the size of the membership of the resulting class." *Moten v. Federal Energy Regulatory Commission*, 97 FEOR 3128 (1997).

2. Additional requirements for acceptance of class complaint.

1. Class complainants do not have to prove the merits of their claims at the class certification stage. Nevertheless, they must provide more than bare allegations that they satisfy the class complaint requirements. *Mastren v. U.S. Postal Serv.*, 94 FEOR 3143, 94 FEOR 3143 (1993).

2. The EEOC recognizes that the complainants have limited access to discovery during the initial processing of a class complaint and that the contours of the case may change with the addition of further information. An EEOC AJ makes the decision concerning whether a class complaint should be certified or dismissed, but continues to have the authority to "redefine a class, subdivide it, or dismiss it" based on future developments. EEOC MD-110, Chapter 8.
3. Notice to class members and opting out. Within 15 days of receiving notice that an administrative judge has certified a class complaint, the agency is obligated to notify all class members that the complaint has been accepted. In some cases, the administrative judge may set another reasonable time frame for notification. See 29 C.F.R. § 1614.204(e)(1). Agencies are to use a reasonable means of notifying class members, such as mailing the notice to the members' last known addresses. If the agency intends to appeal the administrative judge's acceptance of the complaint, it may seek a stay in distributing the notice. See MD-110 at 8-6.
4. Individual relief upon finding of class-wide discrimination. After the hearing, the administrative judge issues a recommended decision, including any recommended relief. If no class relief is appropriate, the administrative judge will determine if any individual class members are entitled to relief, and if so, issue a recommendation of individual relief. The Commission's regulations on recommended decisions are found at 29 C.F.R. § 1614.204(i).

V. RIGHT TO REPRESENTATION. At any stage in the processing of a complaint, including the counseling stage 1614.105, the complainant shall have the right to be accompanied, represented, and advised by a representative of complainant's choice. 29 C.F.R. § 1614.605.

VI. OFFICIAL TIME.

- A. Reasonable time to prepare and attend—normally considered in hours, not days or weeks. If the complainant is an employee of the agency, he or she shall have a reasonable amount of official time, if otherwise on duty, to prepare the complaint and to respond to agency and EEOC requests for information. If the complainant is an employee of the agency and he designates another employee of the agency as his or her representative, the representative shall have a reasonable amount of official time, if otherwise on duty, to prepare the complaint and respond to agency and EEOC requests for information. 29 C.F.R. § 1614.605

- B. The agency is not obligated to change work schedules, incur overtime wages, or pay travel expenses to facilitate the choice of a specific representative or to allow the complainant and representative to confer.
- C. Does not allow official time for witnesses to prepare, but allows for official time when their presence is authorized or required by Commission or agency officials in connection with a complaint. Agency may restrict overall hours of official time for representative to certain percentage of representative's duty hours. *Morman v. Dep't of Air Force*, EEOC Appeal No. 07A10059 (2002).

VII. EXHAUSTION OF ADMINISTRATIVE REMEDIES.

- A. Requirement for Exhaustion of Administrative Remedies Before Seeking Judicial Review. *Brown v. General Services Admin.*, 425 U.S. 820 (1976).
 - 1. Employee must get a final agency decision or wait 180 days after filing administrative complaint before going to court.
 - 2. Age discrimination complainant may bypass administrative process and go directly to federal court after giving EEOC 30-day notice of intent to sue within 180 days of alleged discriminatory act. *Stevens v. Dep't of Treasury*, 500 U.S. 1 (1991); 29 U.S.C. § 633a(c)-(d); 29 C.F.R. § 1614.201(a).
- B. Equitable tolling applies to time limits for filing Title VII and other discrimination actions. *Irwin v. Veterans Admin.*, 498 U.S. 89 (1990) (requirement that employment discrimination action be brought against federal government within 30 days of receipt of EEOC notification is subject to equitable tolling. Civil Rights Act of 1964, § 717(c), as amended, 42 U.S.C.A. § 2000e-16C(c)).

VIII. JUDGMENT FUND.

- A. Federal agencies (local installations) have always paid the costs associated with EEO cases decided against them or settled in the administrative phase. Until recently, any monetary relief (whether awarded in settlement or in civil judgment) resulting from civil suit was paid by the Judgment Fund, a permanently authorized fund administered by the Treasury.

- B. New Law. The “Notification and Federal Employee Anti-Discrimination and Retaliation Act of 2002” (No Fear Act), holds Federal agencies financially accountable for violations of discrimination and whistleblower laws by *requiring agencies to reimburse* the Judgment Fund for settlements and judgments paid to employees as a result of such complaints.
1. Army: MACOM/local activity will continue to be responsible for damages paid in the administrative process. DoD and Army have developed “No Fear Act” implementation guidance that address civil judgments and reporting requirements.
 2. The procedures that agencies must use to reimburse the Judgment Fund are those prescribed by the Financial Management Service (FMS) and the Department of the Treasury in Chapter 3100 of the Treasury Financial Manual. All reimbursements to the Judgment Fund covered by the No FEAR Act are expected to be fully collectible from the agency. FMS will provide written notice to the agency's Chief Financial Officer within 15 business days after payment from the Judgment Fund.
 3. Within 45 business days of receiving the FMS notice, agencies must reimburse the Judgment Fund or contact FMS to make arrangements in writing for reimbursement. 5 C.F.R. § 724.

IX. CONTRACTOR EMPLOYEES.

- A. Who is an employee for the purpose of filing a discrimination complaint under part 1614 of title 29, Code of Federal Regulations?
1. EEOC and Federal courts have taken the position that the definition of employee at 5 U.S.C. § 2105 is not dispositive of the issue.
 2. A person that is an employee within the meaning of 5 U.S.C. § 2105 and otherwise has standing will be considered an employee for this purpose.
 3. It is possible for a contractor employee to bring a discrimination complaint even though they are not an employee under Title 5. *Spirides v. Reinhardt*, 613 F.2d 826 (D.C. Cir. 1979).

4. In *Bryant v. Dep't of Justice*, 107 FEOR 385 (2007), the EEOC cited *Ma v. Dep't of Health and Human Services*, 98 FEOR 3226 (1998), which provides the factors to be considered in applying the common law of agency test to determine whether an individual is an agency employee versus a contractor. Not one of the following factors is determinative, but all aspects of an individual's relationship with the agency must be considered. The EEOC will look to the following non-exhaustive list of factors:
 - a. The employer has the right to control when, where, and how the worker performs the job.
 - b. The work does not require a high level of skill or expertise.
 - c. The employer furnishes the tools, materials, and equipment.
 - d. The work is performed on the employer's premises.
 - e. There is a continuing relationship between the worker and the employer.
 - f. The employer has the right to assign additional projects to the worker.
 - g. The employer sets the hours of work and the duration of the job.
 - h. The worker is paid by the hour, week, or month rather than the agreed cost of performing a particular job.
 - i. The worker does not hire and pay assistants.
 - j. The work performed by the worker is part of the regular business of the employer.
 - k. The worker is not engaged in his/her own distinct occupation or business.
 - l. The employer provides the worker with benefits such as insurance, leave, or workers' compensation.

- m. The worker is considered an employee of the employer for tax purposes (i.e., the employer withholds federal, state, and Social Security taxes).
- n. The employer can discharge the worker.
- o. The worker and the employer believe that they are creating an employer-employee relationship.

B. Agency Not An Employer.

1. *Herrera v. Dep't of Army*, 109 FEOR 96 (2008). The complainant failed to establish that he was jointly employed by the Department of the Army and a private contractor. The contractor's decision to terminate him demonstrated that it had more control over him than the agency. Further, the contractor administered his performance evaluations, the complainant identified himself as a contract employee in his e-mails, and the contractor had the ability to address performance matters with him.
2. *Washington v. U.S. Postal Serv.*, 107 FEOR 435 (2007). The agency appropriately dismissed the complainant's EEO complaint because he was not an agency employee. The complainant worked independently, providing all the materials to construct concrete pads at sites designated by the agency, he used his own vehicle, and he submitted invoices to the agency in order to receive payment.
3. *Fearn v. TVA*, 97 FEOR 1129 (1996). In determining whether appellant was an employee of the contractor or of the agency, the Commission noted, first of all, that the contractor gave him a job assignment at the agency. In addition, appellant did not receive a pay check from the agency, was not a member of the agency retirement system, did not earn agency sick or annual leave, did not participate in the agency's health plan, and was not a member of the agency's retirement system. Furthermore, his work for the agency was accomplished under the guidelines of the contract between the contractor and the agency; thus, the agency did not have complete control over the means and manner of his work. Taking all the above factors into consideration, the appellant was deemed an employee of the contractor and not that of the agency.

C. Agency As Employer.

1. The complainant worked as a dentist for a contractor at an Air Force facility. In concluding that he was an employee for EEO purposes, the EEOC noted in part that he performed his work in an agency facility where the agency provided administrative support, as well as all the equipment, supplies and dental clinic attire. The complainant submitted his requests for leave to an agency manager, and the agency could request his termination. The agency and the company agreed that the contract was to be performed "under the control and general supervision" of an Air Force commander. *Ames v. Dep't of Air Force*, 108 FEOR 263 (2008).
2. Citing recent court decisions, as well as factors in the common law of agency test, the EEOC found the complainant, a court security officer employed by AKAL Security Inc., qualified as a DOJ employee for the purposes of his EEO complaint. The agency provided the essential equipment for the job and retained exclusive control over the work performed, including "the time, place, and manner in which it must be performed, and the number of individuals performing it at any given time." *Bryant v. Dep't of Justice*, 107 FEOR 385 (2007).

D. Agency and Contractor - Joint Employers.

1. The complainant was jointly employed by FSS Alutiiq Joint Venture and the Department of the Navy. She was supervised by a Navy employee. Her only contact with Alutiiq staff was to send them time cards and leave slips that were previously approved by the agency. She attended agency meetings at the beginning and end of her shift, the agency assigned her work and provided her with safety training, and she worked on agency premises, using agency tools for the most part. *Schwartz v. Dep't of Navy*, 107 FEOR 518 (2007).
2. The agency improperly dismissed an EEO complaint alleging discriminatory nonselection. Although the licensed practical nurse position at issue was to be filled through a private contractor, the agency's participation in the selection and supervision of the employee was such that the EEOC considered it a joint employer with the private contractor. *Baker v. Dep't of Army*, 106 FEOR 292 (EEOC 2006).

X. CONCLUSION.

ENCLOSURE 1

BASIC (NON-MIXED) EEO COMPLAINT PROCEDURES

(In Plain English for Lawyers, for the most part)

1. The first step is to contact an Equal Employment Opportunity (EEO) Counselor at the local activity within 45 days of the discriminatory action. The individual may request to participate in Alternative Dispute Resolution (ADR).
2. Counseling must be completed within 30 days and ADR within 90 days. At the end of counseling, or if ADR is unsuccessful, the individual may then file a complaint with the agency.
3. The agency (i.e. Investigations and Resolutions Division charter is to investigate Equal Employment Opportunities discrimination complaints for Department of Defense agencies) must complete an investigation of the complaint within 180 days of the date the formal complaint is filed.
4. Once the investigation is completed, the complainant has 30 days to request a hearing and decision by an Equal Employment Opportunity Commission (EEOC) administrative judge; an immediate final decision from Army The Equal Employment Opportunity Compliance and Complaints Review (EEOCCR) (or Secretary of the Navy, etc.) or may submit a written request to withdraw the complaint.
5. In cases where a hearing is requested, the administrative judge issues a decision within 180 days and sends the decision to both parties. Where discrimination is found, the administrative judge orders appropriate relief. If the agency does not issue a final order within 40 days after receiving the administrative judge's decision, the decision becomes the final action of the agency.
6. If the agency issues an order notifying the complainant that the agency will not fully implement the decision of the administrative judge, the agency must also file an appeal to EEOC.
7. A dissatisfied complainant may appeal to EEOC an agency's final action within 30 days of receipt. The agency may appeal a decision by an EEOC administrative judge within 40 days of receiving the administrative judge's decision.
8. A complainant who has filed an individual complaint may file a civil action in an appropriate United States District Court District Court as follows: within 90 days of receipt of the final action, if no appeal has been filed; after 180 days from the date of filing a complaint, if an appeal has not been filed and final action has not been taken; within 90 days of receipt of the EEOC's final decision on an appeal; or after 180 days from the date of filing an appeal with the EEOC, if there has been no final decision by the EEOC.

CHAPTER I

UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT (USERRA)

I.	REFERENCES.....	2
II.	OVERVIEW.....	3
III.	PREREQUISITES FOR APPLICATION OF STATUTE.....	3
IV.	PROTECTIONS	6
V.	BURDEN OF PROOF.....	14
VI.	EMPLOYER DEFENSES.....	15
VII.	ASSISTANCE AND ENFORCEMENT.....	16
VIII.	OTHER MATTERS.....	21
IX.	NEW/FUTURE DEVELOPMENTS.....	22
IX.	CONCLUSION.....	22
	APPENDIX A – Exceptions to the 5-Year Military Service Limit	23
	APPENDIX B – Fort McCoy: Procedures Covering Civilian Employees Entering and Returning from Military Duty Returning from Military Duty.....	27
	APPENDIX C – Office of Special Counsel and USERRA Cases	36

OUTLINE OF INSTRUCTION

I. REFERENCES.

- A. Uniformed Services Employment and Reemployment Rights Act (USERRA), P.L. 103-353, 108 Stat. 3149 (1994), as amended, codified at 38 U.S.C. §§ 4301-4335.
- B. The Higher Education Opportunity Act of 2008, 20 U.S.C. §§ 1001–1161aa-1 (2012).
- C. Department of Labor, USERRA Final Rules, 20 C.F.R. Part 1002 (19 Dec 2005).
- D. Readmission Requirements for Servicemembers, 34 C.F.R. § 668.18 (2013).
- E. Department of Defense Instruction 1205.12, Civilian Employment and Reemployment Rights of Applicants for, and Service Members and Former Service Members of the Armed Forces (4 Apr. 1996 w/ch. 1, 16 Apr. 1997).
- F. Army Regulation 27-3, The Army Legal Assistance Program, para 3-6e (21 Feb 96).
- G. Restoration to Duty from Uniformed Service, 5 C.F.R. Part 353 (2008).
- H. [MSPB] Practices and Procedures for Appeals Under the Uniformed Services Employment and Reemployment Rights Act and the Veterans Employment Opportunity Act, 5 C.F.R. Part 1208 (2004).
- I. Lieutenant Colonel H. Craig Manson, *The Uniformed Services Employment and Reemployment Rights Act of 1994*, 47 A.F. L. REV. 55 (1999).
- J. Anthony H. Green, *Reemployment Rights Under the Uniformed Services Employment and Reemployment Rights Act (USERRA)*, 37 IND. L. REV. 213 (2003).
- K. Ryan Wedlund, *Citizen Soldiers Fighting Terrorism: Reservists' Reemployment Rights*, 30 WM. MITCHELL L. REV. 797 (2004).

- L. Jeffrey M. Hirsch, *Can Congress Use Its War Power to Protect Military Employees from State Sovereign Immunity?*, 34 SETON HALL L. REV. 999 (2004).
- M. Theresa M. Beiner, *Subordinate Bias Liability*, 35 U. ARK. LITTLE ROCK L. REV. 89 (2012).
- N. Lieutenant Colonel Paul Conrad, *USERRA Note, How Do You Get Your Job Back?*, ARMY LAW., Aug. 1998, at 30.
- O. Lieutenant Colonel Paul Conrad, *Labor Law Note, Merit System Protection Board Addresses the Uniformed Services Employment and Reemployment Rights Act*, ARMY LAW., Sept. 1997, at 47.
- P. Government Accountability Office Report (GAO-02-608), *Reserve Forces: DoD Actions Needed to Better Manage Relations between Reservists and Their Employers* (June 2002).
- Q. Government Accountability Office Report (GAO-05-74R), *U.S. Office of Special Counsel's Role in Enforcing Law to Protect Reemployment Rights of Veterans and Reservists in Federal Employment* (6 Oct 04).

II. OVERVIEW.

- A. Although a number of benefits are available under the law, the USERRA's main provisions call for reinstatement of civilian employment following the conclusion of periods of duty with the armed forces.
- B. This outline considers USERRA from the standpoint of the following three questions:
 - 1. What are the prerequisites (i.e., requirements) for a returning service member to gain the protections of USERRA?
 - 2. What are the specific reemployment protections granted by USERRA?
 - 3. How are the USERRA protections enforced if an employer does not comply with the law?

III. PREREQUISITES FOR APPLICATION OF STATUTE. [38 U.S.C. § 4312].

1. Employee must have held a civilian job. USERRA applies to virtually all employers: the federal government, state governments, and all private employers. (There are no exceptions based on size.)
2. Even a temporary job may get USERRA protections, if there was a “reasonable expectation that employment will continue indefinitely or for a significant period.” The burden is on employer to prove that the job was not permanent.

B. Employee must have given prior notice of military service to civilian employer.

1. Statute requires notice. It does not require written notice. A writing will, however, minimize disputes and proof problems.
2. Notice may be given by the service member or by a responsible officer from the service member’s unit.
3. Exceptions: “military necessity” precludes notice (e.g., fact of deployment is classified) or where giving notice would be otherwise “unreasonable.” Clear from legislative history, and case law construing predecessor legislation, that this exception will be construed narrowly. The service member should give notice as soon as possible.

C. Employee’s period of military service cannot exceed five years.

1. Five-year limit on military service is cumulative.
2. The five-year clock restarts when employee changes civilian employers.
3. Some types of service (e.g., periodic/special Reserve/NG training, service in war or national emergency, service beyond five years in first term of service) do not count toward the five-year calculation. See Appendix A for a discussion of exceptions to the five-year rule.

4. The five-year period does not start fresh on 12 December 1994 (effective date of USERRA) - it reaches back to include all periods of military service during employment with given employer, unless such service was exempted from older Veterans' Reemployment Rights Act's (VRRA)¹ four-year service calculations.

D. Employee's service must have been under "honorable conditions" - that is, no punitive discharge, no OTH discharge, and no DFR.

1. For service of 31 (or more) days, employer can demand proof of honorable conditions.
2. Proof can consist of a DD Form 214, letter from commander, endorsed copy of military orders, or a certificate of school completion.

E. Employee must report back or apply for reemployment in a timely manner.

1. If service is up to 30 days, the servicemember must report at next shift following safe travel time plus 8 hours (for rest).
2. If service is from 31 days to 180 days, the servicemember must report or reapply within 14 days.
3. If service is for 181 days or more, the service member must report or reapply within 90 days.
4. Extensions are available if employee can show that it was impossible or unreasonable, through no fault of the employee, to report or reapply.
5. Reapplication need only indicate that:
 - a. Service member formerly worked there;
 - b. Service member is returning from military service; and,
 - c. Service member requests reemployment pursuant to USERRA.

¹ Commonly referred to as "The Veterans' Reemployment Rights Act," the USERRA's antecedent legislation "was never an 'Act' with its own special title." Lieutenant Colonel H. Craig Manson, *The Uniformed Services Employment and Reemployment Rights Act of 1994*, 47 A.F.L. REV. 55 at n. 9, 57 (1999).

- d. The request need not be in writing. Written request for reemployment is preferred and will hopefully work to avoid disputes and proof problems.
6. A service member who fails to comply with USERRA's timeliness requirements does not lose all USERRA protections. The employer, however, is entitled to treat (and discipline) that employee's late reporting just like any other unauthorized absence.

IV. **PROTECTIONS.** [38 U.S.C. §§ 4311-18.]

- A. There are several entitlements (protections) available if the service member (employee) meets the prerequisites discussed above.
- B. **Prompt Reinstatement.** If the employee was gone 30 (or fewer) days, the employee must be reinstated immediately; if gone 31 (or more) days, the reinstatement should take place within a matter of days.
- C. **Leave of absence and reinstatement.**
 1. 38 U.S.C. § 4316 amended in 2000 added subsection e.
 2. Employers must grant an authorized leave of absence when necessary for employee to perform funeral honors duty under either 10 U.S.C. § 12503 or 32 U.S.C. § 115.
 3. *See also* 38 U.S.C. § 4303(13)(includes "funeral honors duty" within definition of "service in the uniformed services").
- D. **Status.** The employee may object to the proffered reemployment position if it does not have the same status as previous employment. Examples:
 1. "Assistant Manager" is not the same as "Manager," even if both carry the same remuneration.
 2. One location or position may be less desirable than another (geographically, by earnings potential, or by opportunity for promotion).

3. A change in shift work (from day to night, for example) can be challenged.

E. **Seniority.** If the employer has any system of seniority, the employee returns to the “escalator” as if he or she had never left the employer’s service.

1. If the service was for 90 days (or less), the employee is entitled to the same job (plus seniority). If the service was for 91 days (or more), the employee is entitled to the same “or like” job (status and pay), at employer’s option, plus seniority.
2. Seniority applies to pension plans as well (including SEP, 401(k) and 403(b) plans). The seniority principle protects the employee for purposes of both vesting and amount of pension. Additional information is provided in IRS Revenue Procedure 96-49, which requires private pension plans to comply with USERRA pension requirements NLT 1 July 1998, and government pension plans NLT 1 January 2000.
 - a. If the employer has a plan that does not involve employee contribution, employer must give employee pension credit as if employee never left.
 - b. If the pension depends on a variable that is hard to estimate because of the employee’s absence (e.g., amount of accrued pension depends on percent of commissions earned by employee), employer may use what employee did in the 12 months before service to determine pension benefits. Employer may not, in any case, use military earnings as basis to figure civilian pension accrual.
 - c. If the employer has a plan that involves employee contributions, employee must make up the contributions after returning to work. The employee has a period of three times the period of absence for military service, not to exceed five years, to make up the contributions. The employer may charge no interest. Federal employees are entitled to a period of four times the period of absence to make up contributions, per 5 C.F.R Part §1620.46 and §1605.11 (2004).

F. **Health Insurance.**

1. Immediately upon return to the civilian job, the employee (and his/her family) must be reinstated in the employer's health plan. The employer may not impose any waiting period or preexisting condition exclusions, except for service-connected injuries as determined by the Department of Veterans Affairs.
2. USERRA also offers continued employer health coverage, at the option of the employee, during the military service. (Federal employees should refer to 5 C.F.R. §890.305 (2004).)
 - a. Employers must, if requested, continue employee and family on health insurance up to first 30 days of service. Note: TRICARE does not cover dependents on tours of less than 31 days. Cost to employee cannot exceed normal employee contribution to health coverage.
 - b. Employees may request coverage beyond 31 days. Employer must provide this coverage up to 180 days or end of service (plus reapplication period), whichever occurs first. However, employers may charge employees a premium not to exceed 102% of total cost (employee + employer) of the entire premium from the first day of any tour over 30 days.
 - c. Period of coverage is for up to 2 years.

G. Training, Retraining, and Other Accommodations. An employee who returns to the job after a long period of absence may find his/her skills rusty or face some new organization or technology. An employer must take "reasonable efforts" to requalify the employee for his/her job.

1. "Reasonable efforts" are those that do not cause "undue hardship" for the employer. A claim of "undue hardship" requires an analysis of the difficulty and expense in light of the overall financial resources of employer (and several other factors). The USERRA language is similar to that employed in the Americans with Disabilities Act (ADA).
2. If the employer cannot accommodate the employee, the employer must find a position which is the "nearest approximation" in terms of seniority, status, and pay.

- H. **Special Protection Against Discharge.** Depending on the length of service, there are certain periods of post-service employment where, if the employee is discharged, the employer will have a heavy burden of proof to show discharge for cause. This provision is a hedge against bad faith or pro forma reinstatement.
1. For service 181 days (or more), the subsequent protection lasts a year.
 2. For service of 31 days to 180 days, the subsequent protection lasts for 180 days.
 3. There is no special protection for service 30 (or less) days. However, the statute's general prohibition against discrimination or reprisal applies.
 - a. Employers cannot discriminate in hiring, employment, reemployment, retention in employment, promotion, or any other benefit of employment because of military service. Not only are current Active and Reserve Component military members covered, but so are veterans. See *Petersen v. Dep't of Interior*, 71 M.S.P.R. 227 (1996).
 - b. Employers cannot require someone to use vacation time/pay for military duty [38 U.S.C. § 4316(d)]. See *Graham v. Hall-McMillen Company, Inc.*, 925 F. Supp. 437 (N.D. Miss. 1996) (Reservist may not be fired for complaining about employer requiring him to use vacation pay/days for military duty.)
 - c. Employers may not take adverse action against anyone (not just the military employee) when that person testifies or assists in a USERRA action or investigation or when that person refuses to take adverse action against a military employee. *Brandsasse v. City of Suffolk*, 72 F.Supp.2d 608, (E.D. Va. 1999) (Police Department may not initiate internal affairs investigation against Reservist police officer in retaliation for requesting accommodations to attend Reserve training.)
 - d. Federal military veteran/Reserve employees may raise "hostile work environment" discrimination claim based upon the individual's military status. See *Petersen v. Dep't of Interior*, 71 M.S.P.R. 227, 1996 MSPB LEXIS 735 (1996).

- I. **Other Non-Seniority Benefits.** If the employer offers other benefits, not based on seniority, to employees who are on furlough or nonmilitary leave, the employer must make them available to the employee on military service during the service. (For federal employees, see 5 C.F.R. §353.106 9(c).)
1. Examples: employee stock ownership plans (ESOP), low cost life insurance, Christmas bonus, holiday pay, etc.
 2. If the employer has more than one leave/furlough policy, the military employee gets the benefit of the most generous. However, if policies vary by length of absence, the military employee may only take advantage of policies geared to similar periods of absence (e.g., 6 months, 1 year, etc.) of absence.
 3. The employee may waive the right to these benefits if the employee states, in writing, that s/he does not intend to return to the job. Note, however, that such a written waiver cannot deprive the employee of his other reemployment rights should he “change his mind” and seek reemployment.
- J. **Location of Employment.** *Hill v. Michelin North America, Inc.*, 252 F.3d 307 (4th Cir. 2001).
1. Court notes that “USERRA defines ‘benefit of employment’ as ‘any advantage, profit, privilege, gain status, account or interest’ arising from an employment contract, including ‘the opportunity to select work hours or location of employment.’” (Citing 38 U.S.C.A. § 4303(2).)
 2. Facts in dispute about whether employee’s transfer was at his request or improperly motivated due to his service in the USNR.
 3. Regardless, transfer was from one section of plant described as “a clean working environment [where] employees are allowed to wear street clothes and [where they] are not required to shower at the end of their shifts.”
 4. Held, *in dicta*, that these were benefits of employment when employee transferred to section of plant described as “very dirty and [where] employees are required to wear coveralls and to shower at the end of their shifts.”

K. Compensation and related matters.

1. ***Wriggelsworth v. Brumbaugh***, 129 F. Supp. 1106 (W.D. Mich. 2001).
 - a. Facts: Police officer returns from military service. Employer willing to rehire him as a detective. Union objects saying that this will adversely impact other members. Employer hires service member back at an entry level and sues for declaratory judgment to resolve matter. Hired back approximately five months later than he was otherwise ready to return.
 - b. Service member awarded backpay (difference between entry level pay and detective pay), accrued sick leave prior to entry on active duty, accrued sick leave from time he returned from active duty, accrued seniority, and pension benefits.
 - c. Service member also awarded clothing allowance even though he did not work as a detective, the position for which the allowance was designed.
2. ***Yates v. Merit Systems Protection Board***, 145 F.3d 1480 (Fed. Cir. 1998).
 - a. Facts: Plaintiff postal worker enters a 90-day training period with periodic evaluations at 30, 60, and 90 days. Performs two week annual training during first 30 days. Was not given a two-week extension. Although there was an evaluation on the 60th day, she was also not evaluated after 30 days.
 - b. Holding: A two-week extension and evaluation at the 30th day were benefits of employment.
3. ***Ganon v. Sprint Corp.***, 284 F.3d 839 (8th Cir. 2002).
 - a. Facts: Retired LTC hired, but salaried at \$1000.00 less because he lacked experience in industry.
 - b. Holding: USERRA does not protect wages as a “benefit of employment.”

- c. *See also*, 38 U.S.C. § 4303(2).
- 4. ***Fink v. City of New York***, 129 F. Supp.2d 511, 521 (E.D.N.Y. 2001)(denial of opportunity to take a “promotional” test, a test that serves as a benchmark for promotion, held to be an unlawful employment practice).

K. Paid military leave.

- 1. ***Butterbaugh v. DOJ***, 336 F.3d 1332 (Fed. Cir. 2003).
 - a. Issue in case was whether Federal military leave statute meant that employees would be given military leave as against their workdays or calendar days. (5 U.S.C. § 6323(a)(1) grants 15 days per year.)
 - b. OPM practice, prior to 21 December 2001, had been to count calendar days whether or not the employee had been scheduled to work for all of those days unless the days fell at either the beginning or ending of the period. (E.g., a reservist who left work for reserve duty on Friday, the fourth and who returned to work on Monday the fourteenth would be charged eight days of military leave. Even though not scheduled to work at the civilian job on Saturday the fifth or Sunday the sixth, these days would be charged as military leave. A reservist who left work on Monday the seventh and who began training on that day and who returned on Monday the fourteenth would be charged for only five days.)
 - c. Held that statute giving military leave meant workdays.
 - d. Petitioners had also challenged the practice as a denial of a benefit of employment under USERRA, but the court ruled otherwise noting that the petitioners had not been denied leave. The only real question was the meaning of 5 U.S.C. § 6323(a)(1).
 - e. OPM has put out guidance for employees who wish to make an administrative claim. This guidance notes that the Barring Act (31 U.S.C. § 3702) means that “a leave claim against the Government must be received by the agency . . . within 6 years after the claim accrues.”

2. ***Miller v. City of Indianapolis***, 281 F.3d 648 (7th Cir. 2002).
 - a. Similar facts in that firemen worked 24-hour shifts. Local policy construed state military leave statute to mean that the absence from one 24-hour shift amounted to the loss of three days military leave.
 - b. Unlike the court in ***Butterbaugh***, the court spent little time interpreting the state statute as state authorities had held that missing a 24-hour shift translated to the loss of three days military leave.
 - c. As to the plaintiffs' USERRA claims, the court found that there was no discriminatory treatment. Other firemen, who were guardsmen or reservists, but who did not work 24-hour shifts, were treated similarly. That is, other employees were caused to use their military leave at an equal rate.

L. Liquidated damages, costs, and attorney fees.

1. ***Wriggelsworth v. Brumbaugh***, 129 F. Supp. 1106 (W.D. Mich. 2001).
 - a. Service member's backpay award = \$37,356.75 over approximately 2.5 years.
 - b. Reasonable attorney fees = \$32,736.50. (Costs also awarded against employer.)
 - c. Liquidated damages not awarded.
 - (1) No showing that employer had acted in a "willful" manner.
 - (2) Employer had re-hired the service member following a period of active duty.
 - (3) Employer was the plaintiff in the case seeking to resolve differences between its interpretation of USERRA and union's interpretation evincing a concern over "effects on other Union members."

- d. *Compare, Fink v. City of New York*, 129 F. Supp.2d 511 (E.D.N.Y. 2001)(applies a reckless, instead of willful, standard to question of liquidated damages).

V. BURDEN OF PROOF.

- A. *Fink v. City of New York*, 129 F. Supp.2d 511 (E.D.N.Y. 2001).
 1. USERRA relationship to Title VII jurisprudence, ADEA, and ADA. (Relationship to ADA jurisprudence generally, but also more closely in relation to plaintiff's specific ADA claim.)
 2. Conflicting lines of decisions establishing burden of proof in USERRA cases. Adopts the so called "NLRB framework."
 3. After plaintiff makes a prima facie showing, employer may defeat the claim by establishing that the personnel action (dismissal, etc.) would have been taken regardless.
- B. Employer can defeat a claim of improper termination when it shows that termination would have resulted solely on the basis of some "permissible" reason. *Hill v. Michelin North America, Inc.*, 252 F.3d 307 (4th Cir. 2001).
- C. USERRA makes it easier to prevail in allegations of unlawful discrimination - if plaintiff can show that such discrimination was a motivating factor (not necessarily the sole motivating factor), the burden of proof is then on the employer to show that the action would have been taken even without the protected activity. *Robinson v. Morris Moore Chevrolet-Buick, Inc.*, 974 F. Supp. 571 (E.D. Tex. 1997).
- D. Such cases are proven by direct evidence of discrimination or by indirect circumstantial evidence of discrimination. *Duncan v. U.S. Postal Service*, 73 M.S.P.R. 86, 93-94 (1997).

- E. An employee's intervening act of misconduct can overcome an inference of military status discrimination inferred by the close proximity between military duty and an adverse employer personnel action. *Chance v. Dallas County Hospital District*, 1998 U.S. Dist. LEXIS 5110 (N.D. Tex. 1998) (unpub.), *aff'd*, 176 F3d 294 (5th Cir. 1999).
- F. See also, *Sheehan v. Dep't of Navy*, 240 F.3d 1009 (Fed. Cir. 2001); *Leisek v. Brightwood Corp.*, 278 F.3d 895, 898-9 (9th Cir. 2001); *Gummo v. Village of Depew*, 75 F.3d 98 (2d Cir. 1996); *Barreto v. ITT World Directories, Inc.*, 62 F.Supp. 2d 387 (D.P.R. 1999).

VI. EMPLOYER DEFENSES.

- A. The statute, 38 U.S.C. § 4312(d)(1), provides for three defenses.
 - 1. Employer suffers a change in circumstances that make the reemployment impossible or unreasonable.
 - 2. The reemployment of a disabled person or a person who is not suited for the position would pose an undue hardship on the employer.
 - a. "Undue hardship" means "significant difficulty or expense." (38 U.S.C. § 4303(15)).
 - b. Employer must make "reasonable efforts" to accommodate a disabled person (38 U.S.C. § 4313(a)(3)) and look to place the person "in any other position which is equivalent in seniority, status, and pay" when "the person is qualified to perform or would become qualified to perform with reasonable efforts by the employer" (38 U.S.C. § 4313(a)(3)(A)).
 - c. When the employer cannot find a position that is an "approximation" to another position, the employer must still look to employ the person in some position that is "consistent with [the] circumstances of such person's case" (38 U.S.C. § 4313(a)(3)(B)).
 - d. Others who are no longer qualified, but not disabled, receive similar treatment. (38 U.S.C. § 4313(a)(4)).

3. The employment is nonrecurring or brief and such that the person would not have had an expectation of returning.
- B. Other potential defenses.
1. Waiver.
 2. Estoppel.
 3. Laches. *Miller v. City of Indianapolis*, 281 F.3d 648(7th Cir. 2002).
- C. The burden of proof is on the employer. [38 U.S.C. § 4312(d)(2)].

VII. ASSISTANCE AND ENFORCEMENT. [38 U.S.C. §§ 4322-24].

- A. The National Committee for Employer Support of Guard and Reserve (1-800-336-4590). DoD agency. Provides information on USERRA to employees and employers, and seeks to resolve disputes on an informal basis. National and state ombudsman program first step to resolve employer-employee USERRA disputes. Website: <http://www.esgr.org>
- B. **The Veterans' Employment and Training Service (VETS) (1-202-693-4700, 1-877-889-5627).** Department of Labor agency. Primary responsibilities: interprets and administers those statutes and regulations governing USERRA, provides technical assistance, formally investigates allegations of USERRA violations, and helps enforce the statute with the U.S. Department of Justice and U.S. Office of Special Counsel. Website: <http://www.dol.gov/vets/>. VETS will:
1. Investigate to determine if any violation occurred.
 2. In cases of USERRA violation, VETS will attempt to negotiate a suitable resolution with the employer.
 3. When resolution is not possible, VETS will refer the case as appropriate (Office of Special Counsel (OSC) for Federal employees or Department of Justice (DOJ) for all other employees).

4. Upon referral, OSC or DOJ may choose to provide representation free of charge. If they do not, or the veteran does not wish government representation, the individual may retain private counsel at his or her own expense, or proceed as a *pro se* litigant. Action against the employer may then be taken in Federal Court or the MSPB (for federal employers).

For example, in November 2005 the United States District Court for the Western of District of Washington approved a consent decree in a case brought by the Department of Justice on behalf of a Coast Guard reservist against the S.O.G. Specialty Knives & Tools Company (SSK). The plaintiff, who was mobilized and deployed to Iraq in 2003 as part of Operation Iraqi Freedom, alleged that he was terminated prior to his deployment, re-employed in a non-equivalent position upon his return, and then terminated again within 180 days of his return, all in violation of USERRA. Suit was filed by the DOJ Civil Rights Division and the USAO in Washington. The defendant company agreed to an out of court monetary settlement and consent decree enjoining them from taking retaliatory action or further actions in violation of USERRA. See White v. S.O.G. Specialty Knives & Tools, Inc., No. CV51800 (D. Wash. consent decree signed Nov. 1, 2005).

5. Claimants NEED NOT request VETS assistance prior to suing in Federal Court or MSPB, but should wait for completion of VETS action if assistance from DOJ or OSC is requested. *See* 38 U.S.C. § 4323 (a). (If the claimant requests referral to DOJ/OSC prior to completion of the investigation, the case will likely go forward with a negative recommendation, and DOJ/OSC may remand it back to VETS for further investigation.)

C. **Formal Enforcement.** Course of action depends on employer. *See generally*, 38 U.S.C. § 4323

1. Private Employers: Action in U.S. District Court. Venue wherever the private employer maintains a place of business.
2. State employees:

- a. Cases brought on employee's behalf by the United States are under the jurisdiction of any Federal district court located where the state exercises authority. Originally, the DOJ simply provided free representation to the veteran. Statute changed in 1998 to make the United States the party in interest because of Supreme Court finding in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) that Congressional abrogation of State sovereign immunity violates the 11th Amendment of the Constitution. This defense was applied successfully in the USERRA context. See *Palmatier v. Michigan Dep't of State Police*, 981 F. Supp. 529, (W.D. Mich. 1997); *Velasquez v. Frapwell*, 994 F.Supp. 1138 (S.D. Ind 1998), 160 F.3d 389 (7th Cir., Nov. 12, 1998), *vacated in part*, 165 F.3d.593 (7th Cir. 1999); and *Forster v. SAIF Corporation*, 23 F.Supp.2d 1196 (D. Ore. 1998). But see *Diaz-Gandia v. Dapena-Thompson*, 90 F.3d 609, 614 n. 9 (1st Cir. 1996) (Court ruled Eleventh Amendment immunity defense raised by Seminole Tribe does not apply to USERRA/VRRA cases, since USERRA/VRRA are War Power Clause legislation, not Commerce Clause legislation.) See also Jeffrey M. Hirsch, *Can Congress Use Its War Power to Protect Military Employees from State Sovereign Immunity?*, 34 SETON HALL L. REV. 999 (2004)

- b. 1998 USERRA amendments also provide for personal State court USERRA action by state employee. Availability of that remedy is doubtful in light of the U.S. Supreme Court decision in *Alden v. Maine*, 119 S. Ct. 2240 (1999) (Held State courts do not have to enforce federal law-based employee damage actions against state agencies since it violates the Eleventh Amendment). National Guard technicians appear to fall into this group that must depend on the good graces of the United States Attorney to bring USERRA action on behalf of the United States. See *Larkins v. Dep't of Mental Health*, 1999 U.S. Dist. LEXIS 9137 (M.D. Ala. 1999).

3. Federal Employees. See Generally 5 CFR Part 1208. The MSPB has appellate jurisdiction over probationary, and non-probationary federal employees for USERRA claims. See 5 CFR §1208.2. There are no time limits for individuals to file USERRA discrimination claims before the MSPB. See 5 CFR §1208.12 (2004). Process:
 - a. Veteran may choose to request assistance from VETS or go directly to MSPB. If assistance from VETS requested, must wait for VETS process completion before filing MSPB completion.

- b. File appeal with MSPB. OSC may choose to represent veteran, or veteran may retain counsel (and, if a prevailing party, request attorneys fees).
 - c. If dissatisfied with MSPB administrative hearing result, appeal to MSPB, and if necessary to Court of Appeals for the Federal Circuit as in other MSPB appeals.
 - d. *See Rogers v. Dep't of Army*, 80 M.S.P.R. 610 (2001).
 - (1) The case's discussion is illustrative of certain additional USERRA protections found in 5 C.F.R. such as the rule that an employee can be separated "for cause" but a "reduction in force is not considered 'for cause.'" *See also*, 5 C.F.R. § 351.404 (2004).
 - (2) Case is important, if for nothing else, than for its statement that "the agency [(the Army)] seriously misapprehends its obligations under USERRA."
4. VETS has informally retained its policy, dating from the preceding statutory scheme, of not assisting veterans who are represented by counsel. Legal assistance attorneys should beware of holding themselves out to employers or to VETS as the veteran's "counsel." *See also* AR 27-3, The Army Legal Assistance Program, para 3-6e(2), concerning limits on Army legal assistance in USERRA cases.
5. The USERRA adds several new "teeth" to the enforcement of reemployment rights.
- a. Gives the DOL (VETS) subpoena power to aid in the conduct of its investigations.
 - b. Employees who prevail on their claims may be entitled to reinstatement, lost pay (plus prejudgment interest), attorney's fees, and litigation costs. *See* 5 C.F.R. §1201.202(a)(7).

- c. Employees who can demonstrate that reinstatement is not a viable remedy may seek “front pay” damage remedies. *See Graham v. Hall-McMillen Company*, 925 F. Supp. 437, 443-447 (N.D. Miss. 1996).
 - d. If the court finds that the violation was willful, the court may double the back pay award. (Does not apply to MSPB cases involving the federal government as employer.) Where there is evidence of willful employer noncompliance that could result in a double damage award, a jury trial may be authorized. *Spratt v. Guardian Automotive Products, Inc.*, 997 F.Supp.1138 (N.D. Ind. 1998).
- 6. Extraterritorial Jurisdiction. USERRA gives Reservists and veterans residing overseas protections under the Act, provided that they work for the federal government or a private company incorporated in the United States or controlled by a United States corporation. There is an exception from coverage for foreign companies whose compliance with the Act would violate local national law.
- 7. Extension of MSPB Jurisdiction and OSC Representation to Pre-USERRA cases filed after USERRA’s enactment in October 1994. The 1998 Amendments to USERRA provided at 38 USC Section 4324(c) that the MSPB may now hear complaints “without regard as to whether the complaint accrued before, on, or after October 13, 1994 (the day before USERRA enacted). The MSPB holds that this provision does not lead to USERRA’s retroactive application. However it does allow the MSPB to hear and the OSC to represent federal employees in Veterans’ Reemployment Rights Act (VRRRA) (predecessor statute) cases that accrued before or on October 13, 1994. The MSPB opined that Congress was attempting to ensure that the OSC would represent federal employees on VRRRA cases before the MSPB. *Williams v. Dep’t of Army*, 83 M.S.P.R. 109 (1999) and *Venters v. U.S. Postal Service*, 84 M.S.P.R. 34, (1999).
- 8. MSPB pleadings. *Yates v. Merit Systems Protection Board*, 145 F.3d 1480, 1484 (Fed. Cir. 1998).
 - a. Although plaintiff should specifically plead USERRA, the requirement is easily met.

- b. Plaintiff met requirement when she “assert[ed] . . . (1) performance of duty in a uniformed service with the United States; (2) . . . a loss of a benefit of employment; and (3) an allegation that the benefit was lost due to the performance of duty in the uniformed service.
9. Arbitration. The Fifth Circuit held in 2006 that the provisions of USERRA do not preempt an otherwise valid agreement to arbitrate between an employer and an employee. In *Garrett v. Circuit City Stores, Inc.*, the plaintiff, a marine reservist, alleged he was terminated in 2003 during the buildup for Iraqi Freedom because of his status as a Marine Reserve officer. In 1995, as part of a nationwide policy for resolving employment related disputes, Circuit City had promulgated a program which required employees who did not opt out of the program to submit employment disputes to binding arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* The plaintiff had acknowledged this new program in writing and had failed to opt out. Despite this provision of his employment with Circuit City, plaintiff filed his USERRA claim in federal district court without submitting it to arbitration. The district court denied a defense motion to compel arbitration finding that USERRA preempted the arbitration agreement. The appellate court reviewed this decision *de novo*. After reviewing the text of USERRA, its legislative history, and the underlying principles behind the statute, the appellate court *reversed* finding that Congress had not intended USERRA to preempt otherwise valid arbitration agreements and holding that USERRA claims are subject to the FAA. *Garrett v. Circuit City Stores, Inc.*, 449 F.3d 675 (5th Cir. 2006). While it did not specifically address the question, the appellate court implied its decision would remain the same even if the Department of Justice had brought the claim on behalf of the plaintiff (see B.4. above relating to enforcement of USERRA rights by a federal agency on behalf of the plaintiff).

VIII. OTHER MATTERS.

- A. USERRA in state court.
 1. *Miller v. City of Indianapolis*, 281 F.3d 648 (7th Cir. 2002).
 - a. Although not a state court decision, decision is made, in large part, based on state and local legislation granting guardsmen and reservists periods of paid military leave.

- b. *See also Koppin v. Strode*, 761 N.E.2d 455 (Ind. Ct. App. 2002); *Howe v. City of St. Cloud*, 515 N.W.2d 77 (Minn. App. 1994).
 - 2. *Barreto v. ITT World Directories, Inc.*, 62 F.Supp. 2d 387, 393-4 (D.P.R. 1999)(failure to file under Puerto Rican USERRA-like provision within statute of limitation period).
- B. Strict liability. *Curby v. Archon*, 216 F.3d 549, 556 (6th Cir 2000)(reemployment protection proceeds from USERRA’s anti-discrimination provisions rather and is not founded in strict liability).
- C. Intelligence community. *Dew v. United States*, 192 F.3d 366, 372 92d Cir. 1999)(USERRA “preclude[s] judicial review of . . . claims by the employees of the intelligence community”).
- D. Lingering VRRRA application. *Lapine v. Town of Wellesley*, 304 F. 3d 90 (1st Cir. 2001).
 - 1. Facts: USAR member quits job as town police officer, expressing his deep dissatisfaction with the department. Around the time of his resignation, he begins processing a request for active duty as an AGR. Resignation letter says nothing about leaving employment because of active duty. Withdraws \$31,021.79 from state retirement account explaining he has no interest in ever being employed with the state again.
 - 2. Case decided under VRRRA because plaintiff began seeking reemployment with police department in 1993 before USERRA’s effective date.
 - 3. Holding: Service member entitled to return to his employment.

IX. NEW/FUTURE DEVELOPMENTS.

- A. The DOL published new USERRA regulations on 19 December 2005, 20 C.F.R. Part 1002 (Uniformed Services Employment and Reemployment Rights Act of 1994, Final Rules). The new rules became effective 18 January 2006. The new rules implement amendments to USERRA, 38 U.S.C. 4301-4333, which were set forth in the Veterans Benefits Improvement Act of 2004. In part, the amendments require employers to provide a written notice of the rights, benefits, and obligations of employees and employers under USERRA. Employers can provide the notice by mailings, handouts, email, or by posting the notice in the place that employee notices are customarily placed. This amendment is codified at 38

U.S.C. 4334.

- B. Government Accountability Office Report (GAO-02-608), *Reserve Forces: DoD Actions Needed to Better Manage Relations between Reservists and Their Employers* (June 2002). This is a very revealing report. The statements from mobilized guardsmen and reservists in Appendix III are quite remarkable and establish that there is an apparent lack of understanding on the part of employers and employees.

X. CONCLUSION.

APPENDIX A

EXCEPTIONS TO 5 YEAR MILITARY SERVICE LIMIT IN TITLE 38, U.S. CODE SECTION 4312(c) [USERRA]

NOTES:

1. Effective with enactment of the Reserve Officer Personnel Management Act (ROPMA) on October 6, 1994, several section numbers from Title 10 U.S. Code that are referenced as exceptions to the five year limit have been changed.
2. The term “Reservist” means member of the National Guard or Reserve. Sections that apply only to the National Guard or the Coast Guard are identified as such.
3. State call-ups of National Guard members are not protected under USERRA.

Title 38, U.S. Code § 4312(c) “...does not exceed five years, except that any such period of service shall not include...”

Obligated Service -- 4312(c)(1)

Applies to obligations incurred beyond 5 years, usually by individuals with special skills, such as aviators.

Unable to Obtain Release -- 4312(c)(2)

Self-explanatory. Needs to be documented on a case-by-case basis.

Training Requirements -- 4312(c)(3)

10 U.S.C. §10147-----regularly scheduled inactive duty training
(drills) and annual training.

10 U.S. C. §10148-----ordered to active duty up to 45 days because of
unsatisfactory participation.

**EXCEPTIONS TO 5-YEAR MILITARY SERVICE LIMIT IN TITLE 38, U.S. CODE
SECTION 4312(c) [USERRA], continued...**

32 U.S.C. § 502(a)-----NATIONAL GUARD regularly scheduled inactive duty training and annual training.

32 U.S.C. § 503-----NATIONAL GUARD active duty for encampments, maneuvers, or other exercises for field or coastal defense.

Specific Active Duty Provisions -- 4312(c)(4)(A)

10 U.S.C. § 12301(a)-----involuntary active duty in wartime.

10 U.S.C. § 12301(g)-----retention on active duty while in a captive status.

10 U.S.C. § 12302-----involuntary active duty for national emergency up to 24 months.

10 U.S.C. § 12304-----involuntary active duty for operational mission up to 270 days.

10 U.S.C. § 12305-----involuntary retention of critical persons on active duty during a period of crisis or other specific condition.

10 U.S.C. § 688-----involuntary active duty by retirees.

14 U.S.C. § 331-----COAST GUARD involuntary active duty by retired officer.

14 U.S.C. § 332-----COAST GUARD voluntary active duty by retired officer.

14 U.S.C. § 359-----COAST GUARD involuntary active duty by retired enlisted member.

14 U.S.C. § 360-----COAST GUARD voluntary active duty by retired enlisted member.

14 U.S.C. § 367-----COAST GUARD involuntary retention of enlisted member.

**EXCEPTIONS TO 5-YEAR MILITARY SERVICE LIMIT IN TITLE 38, U.S. CODE
SECTION 4312(c) [USERRA], continued...**

14 U.S.C. §712-----COAST GUARD involuntary active duty of Reserve members to augment regular Coast Guard in time of natural/man-made disaster.

War or Declared National Emergency -- 4312(c)(4)(B)

Provides that active duty (other than for training) in time of war or national emergency is exempt from the 5 year limit, *whether voluntary or involuntary activation*. The military operations in Iraq and Afghanistan both fall within this provision. The provision under which most Reserve component personnel serve within this category is 10 U.S. Code §12301(d) (voluntary active duty).

Certain Operational Missions -- 4312(c)(4)(C)

Provides that active duty (other than training) *in support of an operational mission* for which Reservists have been activated under Title 10, U.S. Code §12304 is exempt from the 5 year limit, whether voluntary or involuntary activation. NOTE: In such a situation, involuntary call-ups would be under §12304. Volunteers may be ordered to active duty under a different authority.

Critical Missions or Requirements -- 4312(c)(4)(D)

Provides that active duty in support of certain critical missions and requirements is exempt from the 5-year limit, *whether call-up is voluntary or involuntary*. This would apply in situations such as Grenada or Panama in the 1980s, when provisions for involuntary activation of the Reserves were not exercised.

Specific National Guard Provisions -- 4312(c)(4)(E)

10 U.S.C. Chapter 15-----NATIONAL GUARD call into Federal service to suppress insurrection, domestic violence, etc.

10 U.S.C. §12406-----ARMY/AIR NATIONAL GUARD call into Federal service in case of invasion, rebellion, or inability to execute federal law with active forces

APPENDIX B

FORT McCOY MEMORANDUM

SUBJECT: Procedures Covering Civilian Employees Entering and Returning from Military Duty

Ft. McCoy Letterhead

AFRC-FM-HCH-M

17 September 2001

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Procedures Covering Civilian Employees Entering and Returning from Military Duty

1. References:

a. Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), Public Law 103-353, Title 38 U.S. Code, Chapter 43.

b. Title 5, Code of Federal Regulations, Part 353

c. AR 690-300, Chapter 353.

2. The following procedures are to be used when employees enter and return from military duty in the uniformed services.

a. Employees Entering Military Duty. Employees entering military duty are entitled to be carried on leave without pay (LWOP) unless they elect to use other leave or freely and knowingly provide written notice of intent not to return to a position of employment with the Department of the Army (DA), in which case the employee can be separated. The employee's reemployment rights are the same whether the employee elects LWOP or separation. When an employee enters service in the uniformed services, the following procedures apply:

(1) When the employee notifies his/her supervisor that he/she is entering military service, the supervisor will inform the employee of his/her option to be carried in a LWOP status or be separated. The supervisor will have the employee sign the Information for Employees Entering Military Active Duty and Checklist for Employees Entering Extended Military Active Duty (Enclosure 1). The employee must also provide a copy of the military orders. The supervisor should fax or mail these documents to the organization's civilian personnel POC for forwarding to the Fort McCoy Civilian Personnel Advisory Center (CPAC).

AFRC-FM-HCH-M

SUBJECT: Procedures Covering Civilian Employees Entering and Returning from Military Duty

(2) The organization civilian personnel POC will send to the CPAC a Request for Personnel Action (RPA) for the LWOP or separation action and the appropriate supporting documents.

b. Determining Reemployment Rights. Employees have reemployment rights if the cumulative length of their absences for uniformed service while employed with DA does not exceed five years. Service in the uniformed services includes active duty, active duty for training, and initial active duty for training. There are certain situations or types of services that may extend the five year period, as explained in reference 1a. Upon receipt of the RPA from management, the CPAC will determine whether the employee has reemployment rights based on a review of the Official Personnel Folder for documentation of prior absences for military duty while employed with DA.

c. Filling Positions Vacated by Employees on Military Duty. If an employee has reemployment rights, management has three options for filling a position during the employee's absence for military duty:

(1) Fill as a temporary appointment not to exceed (NTE) one year or NTE the ending date of the incumbent's period of active duty, if less than one year. A temporary appointment may be extended up to a maximum of two years. Employees on temporary appointments are ineligible for coverage under the Federal Employees Group Life Insurance (FEGLI) program. They are also ineligible for coverage under the Federal Employees Health Benefits (FEHB) program until they have completed one year of continuous employment. After a year of continuous employment they may enroll in health benefits but will be charged 100% of the premium plus a 2% administrative fee. Temporary General Schedule employees are not eligible for within-grade increases (WGIs), but temporary Federal Wage System employees are eligible for WGIs. Temporary employees are excluded from retirement system coverage and if later converted to a permanent appointment, the temporary service is not creditable toward retirement.

(2) Fill as a term appointment NTE four years or NTE the ending date of the incumbent's period of active duty, if less than four years. A term appointment cannot be extended beyond

AFRC-FM-HCH-M

SUBJECT: Procedures Covering Civilian Employees Entering and Returning from Military Duty

four years unless a request for extension is approved by the Office of Personnel Management. Employees on term appointments are eligible to enroll in FEHB and FEGLI, are entitled to retirement system coverage, and are eligible to receive WGIs.

(3) Fill the position with a permanent appointment as an obligated position. The employee who left the position to perform military service has statutory reemployment rights to that position. When the obligated position is filled permanently, the selectee will be required to sign an agreement acknowledging that he/she is aware of the position obligation (Enclosure 2). If management chooses this option, they must include the following statement in the remarks section, Part D, of the Recruit/Fill RPA: "This is an obligated position due to the reemployment rights of (name of employee)."

d. Exercise of Reemployment Rights.

(1) Employees who wish to exercise reemployment rights must submit a request to do so within the time limits specified in reference 1a. Management must return the employee to his/her former position as soon as practicable, but no later than 30 days after receiving the application for reemployment.

(2) If the employee's position has been filled on a temporary basis, the incumbent of the temporary position will be terminated as soon as practical after the reemployment of the returnee. If the position has been filled on a term basis, the incumbent will be terminated on the NTE date of the appointment or management will initiate a reduction in force (RIF) action if necessary. If the position has been filled on a permanent, obligated basis, the CPAC will notify the incumbent of the reemployment of the former employee and placement assistance for the incumbent of the obligated position will begin. If no placement can be arranged, management will initiate a RIF action.

e. Failure to Exercise Reemployment Rights. If an employee fails to request reemployment within the time limits specified in reference 1a, management should initiate action to remove the employee for failure to report for work after completion of active duty.

AFRC-FM-HCH-M

SUBJECT: Procedures Covering Civilian Employees Entering and
Returning from Military Duty

3. If you have any questions concerning this issue, feel free
to contact Dawn Pastick, Personnel Management Specialist, at
608-388-4942 or DSN 280-4942.

4. FORT McCOY - TOTAL FORCE TRAINING CENTER.

2 Encl
as

/s/
KIM M. MEYER
Chief, Military Technician
Program Division

DISTRIBUTION:
USARC RSCs/DRCs
USARC DCSPER
USACAPOC
7TH ARCOM

Information for Employees Entering Military Active Duty

On October 13, 1994, the Uniformed Services Employment and Reemployment Rights Act (USERRA) was passed. USERRA expanded the rights of employees entering uniformed services, therefore, giving employees options related to their employment and benefits. The following is information and a checklist designed to counsel employees on their rights and benefits and provide an opportunity for them to make elections regarding their options.

Annual/Military Leave. Employees who enter into active duty may choose to have their annual leave remain to their credit until they return to their civilian position, OR receive a lump-sum payment for all accrued annual leave. This provision applies whether or not an employee is placed on leave without pay (LWOP) or separates.

Permanent employees who perform active military duty may request the use of paid military leave while in a LWOP status. Eligible full-time employees accrue 15 calendar days of military leave and may have up to 30 calendar days of military leave for use during the fiscal year. Employees who wish to use military leave while on LWOP must submit a request to the supervisor of their civilian position in accordance with applicable leave request procedures.

Health Benefits. Employees who are covered by the Federal Employees Health Benefits Program (FEHBP) and are either separated or placed in a LWOP status to perform military service may continue to be covered by FEHB for up to 18 months, unless the employee elects in writing to have the enrollment terminated. If the employee chooses to continue the FEHB, he/she is responsible for paying the employee share of the premium for the first 12 months and 102% for the final 6 months of continued coverage. Employees may pay currently or incur a debt to be paid upon their return.

Note: You may cancel your FEHB at any time by notifying your personnel office. When you cancel an enrollment, it is considered a break in coverage. Termination is not considered a break.

Life Insurance. Employees who separate or are placed on LWOP to perform active duty service continue to be covered by the Federal Employees' Group Life Insurance (FGLI) for up to 12 months at no cost to the employee.

Retirement. An employee who is placed on LWOP while performing active military duty continues to be covered by the retirement law, i.e., CSRS or FERS. Death and disability benefits under the civilian retirement rules would apply if the employee continues in LWOP.

If an employee separates to perform active military duty, he/she would generally receive retirement credit for the period of separation if a deposit for the military service is made.

Upon restoration to the civilian position, the employee may make a deposit for the military service. The deposit is calculated in two ways: 1) Using 7% of military base pay if you are CSRS or 3% if you are FERS, and 2) a percentage* of the civilian pay you would have earned. You would pay the lesser amount.

**Note: Beginning January 2001, the CSRS retirement contribution rate is 7% and FERS is .8%. For service in 2000 the percentages were 7.4% for CSRS and 1.2% for FERS; for service in 1999 the percentages were 7.25% for CSRS and 1.05% for FERS. For service prior to 1999, the percentages were 7% for CSRS and .8% for FERS. Contact the Fort McCoy Civilian Personnel Advisory Center (CPAC) upon your return for more information.*

Thrift Savings Plan. No contributions can be made to the TSP while on LWOP or separation from the civilian position. However, if the employee is restored to his/her civilian position, retroactive contributions and TSP elections may be made to cover that period of service. Employees interested in making retroactive contributions must contact their servicing payroll office to setup a payment plan.

Employees who separate may request withdrawal of their TSP funds; however, employees who are placed on LWOP cannot do so. Employees who have outstanding TSP loans and have questions concerning the effect of their military duty on their loans should contact the CPAC for more information or visit the TSP web site at <http://www.tsp.gov>.

Application for Merit Promotion. While absent on military duty, employees are entitled to be considered for promotions. Employees can access a listing of U.S. Army Reserve Command and Military Technician Program vacancy announcements and obtain copies of specific announcements through the Army Civilian Personnel Online web site, <http://www.cpol.army.mil/va/scripts/public.html>. An updated listing is posted at this web site each Monday, or Tuesday following a Monday holiday. Employees can also request faxed copies of the listing and vacancy announcements from the CPAC by calling 608-388-5127 or obtain recorded vacancy announcement information at 608-388-5627. Employees on military duty should use the application procedures explained in each specific vacancy announcement.

Request for Reemployment. Employees have reemployment rights if the cumulative length of all absences from employment with their employer (Dept of Army) for service in the uniformed services does not exceed five years, with certain exceptions. Service counting toward the five years includes active duty, active duty for training, and initial active duty for training. It does not include annual training. Employees who wish to exercise reemployment rights must submit a request to do so within the following time limits:

1) An employee whose uniformed service is for more than 30 days but less than 181 days must submit an application for reemployment with their former supervisor (copy furnished to the CPAC) no later than 14 days after completing the period of service. (If submitting the application is impossible or unreasonable through no fault of the individual, it must be submitted the next full calendar day when it becomes possible to do so.)

2) An employee whose uniformed service is for more than 180 days must submit an application for reemployment with their former supervisor (copy furnished to the CPAC) not later than 90 days after completing the period of service.

Employees who are in a LWOP status and fail to apply for reemployment within the above time limits will be subject to removal from Federal service.

Appeal Rights. Employees who believe their agency has not complied with the law or with the Office of Personnel Management's regulations may file a complaint with the Department of Labor (202-219-5573) or appeal directly to the Merit Systems Protection Board (MSPB). Employees appealing to the MSPB would need to contact the Fort McCoy CPAC to obtain the appropriate address for their area.

Changes in Status. Employees who are absent on military duty are responsible for notifying the CPAC of any change in their mailing address and/or telephone number. If the employee's initial military tour of duty is extended, the employee should also send a copy of the extension orders to the CPAC.

CHECKLIST FOR EMPLOYEES ENTERING EXTENDED MILITARY ACTIVE DUTY (30 days or more)

(Please initial your election/acknowledgment)

I choose to be:

_____ Placed on LWOP, beginning _____.

_____ Separated, effective _____.

Previous Absence for Uniformed Service:

_____ I have had previous absences for active duty in the uniformed services while employed with the Dept of Army (DA). (This includes active duty and ADT covered by annual leave, military leave, LWOP or separation. It does not include annual training.)

_____ I have not had previous absences for active duty in the uniformed services while employed with DA.

Annual/Military Leave:

_____ I have a balance of annual leave that I would like to be paid a lump sum.

_____ I want to leave my annual leave to my credit.

_____ I have military leave that I want to use. Number of days: _____

Health Benefits:

_____ I want to terminate my FEHB effective _____.

_____ I want to continue by FEHB. I understand that I can cancel at any time but it will be considered a break in coverage for retirement purposes.

_____ I want to pay for my FEHB on a continuing basis during my absence.

_____ I want to incur a debt to be paid upon my return.

(I understand that if I continue my FEHB after the first 12 months, I will pay 102% of the cost and it must be paid currently.)

FEGLI:

_____ I understand that my FEGLI coverage will continue for 12 months with no cost to me.

Retirement:

_____ I understand that if I am placed on LWOP, death and disability benefits continue under my retirement system.

_____ I understand that the military service is potentially creditable service but I must make a deposit for that service to avoid Catch-62 (CSRS must make a deposit if first hired before 10-1-82 – same applies for FERS). I understand the deposit will be calculated based on percentages of my military base pay or the civilian pay I would have earned and I may contact the CPAC for more information upon my return.

Thrift Savings Plan:

If you are restored to your civilian position, you may make retroactive contributions and elections.

_____ I understand that I will need to contact my personnel office to make retroactive TSP contributions and elections.

Promotion Consideration:

_____ I understand that I am entitled to apply and be considered for promotions while on active duty, and I understand how to obtain vacancy announcements.

Reemployment:

_____ I understand my reemployment rights and the time limits for applying for reemployment. I also understand that if I am on LWOP and fail to apply for reemployment within the time limits required by law, I will be subject to removal from Federal service.

Appeal Rights:

_____ I understand my appeal rights if I believe my agency has not complied with the law or with the Office of Personnel Management's regulations.

I understand my rights, benefits and elections:

Signature: _____ Date: _____

Home Address: _____

Military Duty Station Address (if known): _____

OBLIGATED POSITION AGREEMENT

The position I have been selected for,

(Title/Pay Plan/Series/Grade)

at _____

on TDA paragraph/line number _____,

is an obligated position. In accordance with 5 CFR 353.207, the previous incumbent has military reemployment rights to this position.

I have been advised and understand this means I may be displaced by reassignment or reduction in force procedures at a later time should the previous incumbent exercise his/her reemployment rights.

(Typed Name)

(Signature)

(Date)

Encl 2

APPENDIX C

Office of Special Counsel (OSC) Considerations Regarding MSPB Representation on USERRA Cases

1. What is the Office of Special Counsel?

The Office of Special Counsel is an independent federal executive agency that investigates and prosecutes cases involving:

- a. Prohibited Personnel Practices (PPPs) under 5 U.S.C. Section 2302(b).
- b. Federal employee violations of the Hatch Act, which regulates the partisan political activities of federal employees.
- c. Agency violations of law, rule, or regulations; fraud, waste, and abuse of authority; gross mismanagement or a substantial and specific danger to public health and safety, disclosed by federal employee whistleblowers.
- d. Agency denials of veteran and reservist employment or reemployment rights, discrimination based upon military status, and denial of any promotion, or other benefit of employment because of military status.

2. What obligations does USERRA give the Office of Special Counsel, with respect to federal employees who allege agency discrimination, failure to hire or reemploy because of their military or veteran status?

- a. 38 U.S.C. Section 4324(a)(1):

A person who receives from the Secretary [of Labor] a notification pursuant to section 4322(e) may request that the Secretary refer the complaint for litigation before the Merit Systems Protection Board. The Secretary shall also refer the complaint to the Office of Special Counsel established by section 1211 of title 5.

- b. 38 U.S.C. Section 4324(a)(2)(A):

If the Special Counsel is reasonably satisfied that the person on whose behalf a complaint is referred under paragraph (1) is entitled to the rights or benefits sought, the Special Counsel (upon request of the person submitting the complaint) may appear on behalf of, and act as attorney for, the person and initiate an action regarding such complaint before the Merit Systems Protection Board.

- c. 38 U.S.C. Section 4324(a)(2)(B):

If the Special Counsel declines to initiate an action and represent a person before the Merit Systems Protection Board under subparagraph (A), the Special Counsel shall notify such person of that decision.

3. What action does the Office of Special Counsel take upon referral?

- a. Obtains the DOL-VETS investigative file and report/memorandum from the Office of the Solicitor, Department of Labor.
- b. Reviews the entire investigative file in detail.
 - (1) Direct Evidence of Military Status Discrimination
 - (2) Circumstantial Evidence of Military Status Discrimination
 - A. Statements of Animus
 - B. Agency's Explanation
 - C. Disparate Treatment
 - D. Time Chronology
 - E. Conduct of the Veteran/Reserve Component Employee
- c. Reviews the legal analysis from Secretary of Labor, Office of the Solicitor
- d. Determines if further investigation is needed
- e. Conducts their own legal analysis of the facts and law

4. What is the legal standard for a finding of military status discrimination?

- a. The employee's affiliation (or former affiliation) with the active component Armed Forces or the Reserve Components of the Armed Forces (including the National Guard) played a **"substantial or motivating" part** in the agency's adverse action against the employee.
- b. A "substantial or motivating factor" must be more than "some weight", but less than the "sole reason" for agency adverse action against an employee. Each case is examined on its unique facts. The employee must show by a preponderance of evidence (>50%) that military status was a "motivating" or "substantial" basis for adverse agency action. Petersen v. Department of the Interior, 71 M.S.P.R. 227 (1996); *Accord*, Gummo v. Village of Depew, New York, 75 F.3d 98, 106 (2d Cir. 1996)
- c. Once an employee raises a USERRA claim of military status discrimination, the agency must prove that **it would have taken the same action against the employee even if the employee had no military affiliation**. The employee can then rebut the agency's claims by use of direct or circumstantial evidence, showing the agency's defense is really a **pretext for discriminatory conduct**. 38 U.S.C. Section 4311(b).

5. What would be considered "direct evidence" of military status discrimination?

- a. Uncontradicted evidence that something was done or not done to an agency employee because of his or her status as a veteran or military member.
 - (1) Statements found in performance evaluations, letters of reprimand, e.g., that "X is not a 'team player' because of his or her numerous absences for Reserve duty and meetings."
 - (2) Stated reasons given to a veteran or reservist for a particular assignment or demotion. ("You are gone on military duty so much that we can't consider you for X position, as we can't count on you being here when we need you.")
- b. Direct evidence is gathered from documents, witness statements, independent sources (internal inspector general investigations/audits), and agency policy and conduct/past practices.

6. What constitutes "circumstantial evidence" of military status discrimination?

- a. The MSPB, in Duncan v. U.S. Postal Service, 73 M.S.P.R. 86 (1997), has determined that federal employees may **prove indirectly the agency's discriminatory intent** by providing relevant circumstantial evidence which a fact finder can infer discriminatory agency intent. The Board has directed that circumstantial evidence cases use the "burden-shifting analysis" provided under Title VII of the Civil Rights Act of 1964. The employee must establish a *prima facie* case that:
 - (1) he or she was a member of a protected group, the Armed Forces, Armed Forces Reserve Component, or a former member of the military (veteran), and the employer was aware of this status,
 - (2) he or she was similarly situated to an individual who was not a member of the protected group (e.g., someone on sabbatical or pregnancy leave), and
 - (3) he or she was treated more harshly or disparate than the individual who was not a member of the Armed Forces, Armed Forces Reserve Component or veteran. Coleman v. Department of Air Force, 66 M.S.P.R. 498, 508 (1995), *aff'd*, 79 F.3d 1165 (Fed. Cir. 1996).
- b. Once the employee has met the initial burden of proof, the burden "shifts" to the **agency to articulate a legitimate, nondiscriminatory reason for its action**. The agency meets this burden when it introduces evidence, which, on its face, would lead a fact finder to conclude that the agency had a nondiscriminatory basis for its action, regardless whether the agency proves the reason.
- c. Once the agency has raised a legitimate nondiscriminatory defense for its action, the employee must show that the agency's stated reason was really a **pretext for prohibited discrimination**. The employee must show both that the agency's stated reason was not the real reason for its action and that military status discrimination was a motivating factor for the adverse action.
- d. Several types of information help the reservist or veteran prove his case:
 - (1) Statements of animus. Statements of animus are statements by supervisors and agency officials indicating a strong dislike of someone because of military or veteran status. In the Peterson case, the employee was a Vietnam veteran

who was subjected to continuous abusive name calling by his supervisors and co-workers, such as "Psycho" and "Babykiller". Other common agency manager statements would be to disparage Reservists as "unreliable" or "disloyal", "non-team players", and "double dippers".

(2) Disparate Treatment. A good example is where a Reservist on active duty is denied an annual bonus, but a woman employee on pregnancy leave is given the annual bonus.

(3) Time Sequencing/Chronology. Where an agency immediately disciplines or fires an employee after he has asserted his USERRA rights or returned from military duty, despite agency protests of non-discriminatory purpose, a strong inference of discriminatory conduct may be found. *Accord, Robinson v. Morris Moore Chevrolet*, 974 F. Supp. 571 (E.D. Tex. 1997).

7. Does a Reserve or National Guard employee have an obligation to minimize the burden upon the agency by rescheduling military duty or training that conflicts with his agency job demands?

a. Practically speaking, the answer is generally yes. Whenever possible, Reserve and National Guard members should work with their commands to avoid unnecessary conflicts between their military duty and civilian work schedules. This is particularly true in shift work type jobs, such as firemen, policemen, prison guards, postal workers, and hospital workers. Employees should provide their agencies with as much advance notice as possible to avoid scheduling conflicts. Still, military employees do not always have a say as to when they must participate in military training or activations.

b. Agency management must understand that they cannot refuse to allow their military member employees to attend military duty or training for agency convenience. The military mission is paramount. *See* H. Rep. No. 103-65, 103^d Cong., 1st Ses., at 30 (1993):

[T]here is no obligation on the part of the service member to rearrange or postpone already scheduled military service nor is there any obligation to accede to an employer's desire that such service be planned for the employer's convenience.

c. There are no reported MSPB cases where the Board has endorsed adverse action against an employee for failing to minimize the frequency, timing or duration of their military training or duty. The statute, 38 U.S.C. § 4312(h), makes clear that civilian employers, including the federal government, do not decide when, where, or how often employee Reservists do their military duty or training. As Congress observed in creating this section of the Act:

This section makes clear the Committee's intent that no "reasonableness" test be applied to determine reemployment rights and that this section prohibits consideration of timing, frequency, or duration of service so long as it does not exceed the cumulative limits under section 4312(C) and the service member has complied with the requirements under sections 4312(a) and (e).

H. Rep. No. 103-65, 103^d Cong., 1st Ses., at 30 (1993). *See also* OPM Regulation, 5 C.F.R. Section 353.203(c), which urges federal employees to make a good faith effort to resolve work conflicts with their military duty. The 5 C.F.R. Section 353.203(c)

provision should not be used as a test to determine whether the service member's military duty was "reasonable" or "fair to the agency", or whether the OSC should represent a federal employee with a USERRA issue.

8. How do you contact the Office of Special Counsel?

The OSC has a website at <http://www.osc.gov>. You can also contact the OSC senior counsel for USERRA cases, at telephone (202) 653-6005. Merit Systems Protection Board regulations and cases may be found at the MSPB website, <http://www.mspb.gov>.

Chapter J

Employee Appeals, Grievances & Judicial Review

TABLE OF CONTENTS

I. INTRODUCTION	2
II. DUE PROCESS FOUNDATIONS.....	2
A. Constitutional Due Process Requirements	2
B. Available Statutory and Regulatory Appeal and Grievance Rights	4
III. EMPLOYEE APPEAL AND GRIEVANCE RIGHTS.	9
A. Employee Rights Depend On.....	9
B. Employee Status.....	9
IV. MSPB APPEALS	12
A. Agency Decision Notice.	12
B. Employee Appeal.....	12
C. Acknowledgment Order.....	14
D. Agency Response.....	14
E. Motion Practice.....	15
F. Discovery	15
G. Prehearing Submissions and Prehearing Conference(s).	18
H. Hearing.....	19
I. Record.....	21
J. Initial Decision by Administrative Judge.....	21
K. Petition for review (PFR).....	23
L. MSPB Review of Initial Decision.....	24
M. Intervention Before the Board	24
N. OPM Petition for Reconsideration.....	25
O. Judicial Review.....	25
V. JUDICIAL REVIEW	25
A. Judicial Review of MSPB decisions involving nonmixed cases	25
B. Judicial review of "Pure" Discrimination Claims	28
C. Judicial review of decisions in mixed cases	29
D. Constitutional Tort Action	29
VI. CONCLUSION.....	30

Employee Appeals, Grievances & Judicial Review

I. INTRODUCTION.

II. DUE PROCESS FOUNDATIONS.

- A. Constitutional Due Process Requirements. U.S. Const. amend. V: "No person shall . . . be deprived of . . . liberty or property, without due process of law."
1. Property interests are not created by the Constitution, "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law...." *Board of Regents v. Roth*, 408 U.S. 564 (1972). See also *Paul v. Davis*, 424 U.S. 693 (1976).
 2. Property right in continued employment - reasonable expectation of continued employment. *Cleveland School Bd. v. Loudermill*, 470 U.S. 532 (1985). The Ohio statute plainly creates such an interest. Respondents were "classified civil service employees," Ohio Rev.Code Ann. 124.11 (1984), entitled to retain their positions "during good behavior and efficient service," who could not be dismissed "except ... for ... misfeasance, malfeasance, or nonfeasance in office," 124.34. The statute plainly supports the conclusion that respondents possessed property rights in continued employment.
 - a. Statutory sources of a protected property interest. The "cause" requirement of 5 U.S.C. 7503(a) and 7513(a) vests nonprobationary competitive service and nonprobationary excepted service employees with a protected property interest.
 - b. What process is due employees with a protected property interest? Predecisional and post-decisional procedural rights afforded under the Civil Service Reform Act (*i.e.*, 5 U.S.C. 4303(b), 7503(b), and 7513(b)) satisfy due process requirements. *Bush v. Lucas*, 462 U.S. 367 (1983) (holding civil service protections are "clearly constitutionally adequate").

- c. Right to Appeal to Merit Systems Protection Board (MSPB). After they have exhausted the internal agency proceedings required by 4303(a)-(d), the CSRA provides employees with external avenues of redress. Section 4303(e) grants to competitive service and preference eligible employees the right to appeal demotions and removals to the MSPB for administrative review. The MSPB is granted broad investigative and remedial powers, *see* 5 U.S.C. 1205, and its orders may be appealed to the Court of Appeals for the Federal Circuit. Section 4303(e) does not grant excepted employees such recourse to the MSPB. *See Schwartz v. Dep't of Transportation*, 714 F.2d 1581, 1582 (Fed.Cir.1983).
3. Liberty interest in protecting one's good name.
- a. Concept recognizes two interests of a public employee: (1) protection of his good name, reputation, honor, and integrity, and (2) freedom to take advantage of other employment opportunities. These are two separate liberty interests, and the manner in which a public employee is terminated may deprive him of one or both of these interests. When the termination is accompanied by public dissemination of the reasons for dismissal, and those reasons would stigmatize the employee's reputation or foreclose future employment opportunities, due process requires that the employee be provided a hearing at which he may test the validity of the proffered grounds for dismissal.
 - b. Elements of a liberty interest claim. In succeeding cases, the Supreme Court brought *Board of Regents v. Roth*, 408 U.S. 564 (1972) into sharper focus. First, in *Paul v. Davis*, 424 U.S. 693 (1976), the Court stated *Roth* did not hold that defamation of a public employee alone is enough to violate a protected liberty interest. Additionally, the Court explained, to be actionable, the defamation must occur in the course of the termination of employment. *See Melton v. City of Oklahoma City*, 928 F.2d 920 (1991). Second, the stigmatizing statement must be disclosed publicly. *Bishop v. Wood*, 426 U.S. 341 (1976). Third, the stigmatizing statement must be false. *Codd v. Velger*, 429 U.S. 624, 97 S.Ct. 882 (1977).
 - c. Denial of a meaningful name-clearing hearing.

- (1) *Lyons v. Barrett*, 851 F.2d 406 (D.C. Cir. 1988) (Equal opportunity proceeding which former employee of government printing office initiated to charge racial discrimination in his termination did not constitute name-clearing hearing sufficient to redress employee's liberty interest in his reputation arising from investigation into alleged sexual harassment of female co-workers which led to his termination).
- (2) But see *Codd v. Velger*, 429 U.S. 624 (1977) (Nontenured city employee was not entitled to hearing prior to dismissal due to stigmatizing effect of certain material placed in his personnel file where employee did not challenge substantial truth of material in question, because hearing required where nontenured employee has been stigmatized in course of decision to terminate his employment is solely to provide that person an opportunity to clear his name and, if he does not challenge substantial truth of material in question, no hearing would afford promise of achieving that result for him).

d. Office of Personnel Management: Do not annotate reason for removal. SF 50 "Notification of Personnel Action" should simply state "Removed during probationary period."

B. Available Statutory and Regulatory Appeal and Grievance Rights.

1. MSPB Appeal. 5 U.S.C. 7701-7702.

a. Statutory grounds for appeal.

- (1) Removal or reduction in grade for unacceptable performance. 5 U.S.C. 4303(e).
- (2) Removal, reduction in grade or pay, suspension for more than 14 days for misconduct, or furlough for 30 days or less. 5 U.S.C. 7512.
- (3) "Mixed" cases. 5 U.S.C. 7702.

(4) Individual right of action (IRA) appeals. 5 U.S.C. 1221(a). A personnel action that the appellant alleges was threatened, proposed, taken, or not taken because of the appellant's whistleblowing activities. *Campo v. Dep't of Army*, 93 M.S.P.R. 1 (2002); *Gergick v. GSA*, 43 M.S.P.R. 651 (1990).

b. Regulatory grounds for appeal.

(1) Termination of competitive service probationer. 5 C.F.R. 315.806. A very limited right of appeal. The MSPB has jurisdiction only if the probationer makes a nonfrivolous allegation that removal was based on:

(a) Discrimination because of marital status. *Ellis v. Dep't of Treasury*, 81 M.S.P.R. 6 (1999); *Edem v. Dep't of Commerce*, 64 M.S.P.R. 501 (1994); or

(b) Partisan political affiliation. *Munson v. Dep't of Justice*, 55 M.S.P.R. 246 (1992); *James v. Dep't of Army*, 55 M.S.P.R. 124 (1992); *Black v. Dep't of Housing and Urban Dev.*, 38 M.S.P.R. 487 (1988).

(2) Termination of competitive service probationer for conditions arising before appointment. 5 C.F.R. 315.805; 315.806(c). May only appeal on ground that termination was not effected in accordance with the procedures of 5 C.F.R. 315.805 (advance written notice with reasons and reasonable time to answer).

(3) Assignment of probationary managers and supervisors to nonmanagerial or nonsupervisory positions. 5 C.F.R. 315.908(b). This is a very limited appeal right. The MSPB has jurisdiction only if the probationary supervisor demonstrates the reason for returning the employee to nonsupervisory status was discrimination based on marital status or partisan political affiliation. *Hardy v. Merit Systems Protection Bd.*, 13 F.3d 1571 (1994).

(4) Reductions in force. 5 C.F.R. 351.901.

- (5) Denials of within-grade ("step") increases (WIGI's). 5 C.F.R. 531.410. May appeal after employee requests agency reconsideration of denial.
 - (6) Denial of restoration rights (military duty and recovery from compensable injury). 5 C.F.R. 353.401.
2. Grievance and arbitration through a Negotiated Grievance Procedure (NGP). 5 U.S.C. 7121.
- a. Matters covered and procedures vary from one collective bargaining agreement (CBA) to another.
 - b. NGP must include a provision for binding arbitration that may be invoked by either union or agency.
 - c. Employee election (MSPB or NGP).
 - (1) Removal or reduction in grade for unacceptable performance (under Chapter 43).
 - (2) Removal, reduction in grade or pay, suspension for more than 14 days for misconduct, or furlough for 30 days or less (Chapter 75).
 - (3) Once employee makes the election, it is **binding**. 5 U.S.C. 7121(e)(1). Employee may *not* pursue both MSPB appeal and NGP grievance.
 - d. Mandatory use of the NGP (no MSPB appeal available), unless the NGP specifically excludes the matter:
 - (1) Reduction in force (RIF).
 - (2) Denial of within-grade ("Step") increase (WIGI).

3. Administrative Grievance Procedure (AGP).
 - a. Agency References. DoDI 1400.25, subch 771; SECNAVINST 12771.1; MCO 12771.2; AFI 36-1203.
 - b. Processing grievances under the DoD Administrative Grievance System. DoDI 1400.25 is available at http://www.dtic.mil/whs/directives/corres/html/CPM_table2.html.
 - (1) Policy. Expeditious, fair, impartial, and quick resolution of employee disputes. Alternative dispute resolution encouraged.
 - (2) Who can use AGP? Current appropriated fund nonbargaining unit employees; and bargaining unit employees when matter cannot be grieved under NGP.
4. Cannot use AGP. Non-citizens recruited and appointed overseas; and non-appropriated fund (NAF) employees.
5. NAF employee grievances. Separate procedures under AR 215-3, Chapter 8; MCO P12000.11A, para. 5005; Navy BUPERSINST 5300.10A, Section 610.
6. Actions Excluded. Matters covered by NGP; actions appealable to MSPB; matters subject to adjudication by EEOC; nonselection for promotion; termination of probationers, etc. *See DoDI 1400.25 for complete listing.*
7. Procedures.
 - (a) Problem Solving. Optional step. Employee may bypass this and file grievance.
 - (1) Informal presentation of work-related problem to immediate supervisor, or to next level supervisor if problem involves immediate supervisor. Must be presented within 15 days.

- (2) Supervisor must attempt to resolve in 15 days and no later than 30 days. Use of neutral (i.e., mediator) encouraged. If matter presented in writing, supervisor must respond in writing. If unresolved, supervisor must inform employee of time limits to file grievance.

(b) Administrative Grievance Procedure.

- (1) Formal written grievance within 15 days of conclusion of problem-solving process or if not used, within 15 days of the act or event.
- (2) Must be written and specify remedy sought.
- (3) Representation. Employee's choice. Agency can deny if conflict of interest, conflicts with mission, or creates unreasonable costs.
- (4) Deciding official's action.
 - (i) Deciding official must be assigned to an organizational level higher than any employee involved in the grievance or having a direct interest in the matter being grieved unless the deciding official is the head of a DoD component, installation, or activity.
 - (ii) Determines whether to investigate, whether to allow grievant's representative, and how much official time shall be granted. May designate a neutral to examine grievance and make recommendations.
 - (iii) Fully and fairly considers grievance and issues written decision with supporting rationale. Decision normally within 60 days of filing grievance.

(iv) Decision on merits is final and not subject to further review.

(c) Alternate Dispute Resolution.

III. EMPLOYEE APPEAL AND GRIEVANCE RIGHTS.

A. Employee rights depend on --

1. Employee status.
2. Type of action.
3. Existence of collective bargaining agreement.

B. Employee Status.

1. Temporary (5 U.S.C. 7511(a)(1)(A)); seasonal (*Strickland v. Merit Systems Protection Bd.*, 748 F.2d 681 (Fed Cir. 1984)); and part-time employees (5 U.S.C. 3401); *Vaught v. Dep't of Air Force*, 56 M.S.P.R. 554 (1993).
2. Probationary Competitive Service employees. 5 C.F.R. 315.801-315.806.
 - a. Predecisional rights where the basis for the action is:
 - (1) Unsatisfactory conduct or performance during probationary period: Written notice stating reasons and the effective date.
 - (2) Conditions arising before appointment: Advance written notice, including reasons for adverse action, opportunity to reply in writing, and final written decision.
 - b. Appeal and grievance rights.

- (1) MSPB appeal only if:
 - (a) Discrimination based on marital status or partisan political reasons. *Stokes v. Fed. Aviation Auth.*, 761 F.2d 682 (Fed. Cir. 1985); *Mastriano v. Fed. Aviation Auth.*, 714 F.2d 1152 (Fed. Cir. 1983); *Gribben v. Dep't of Justice*, 55 M.S.P.R. 257 (1992); *Harris v. Dep't of Justice*, 25 M.S.P.R. 577 (1985).
 - (b) Procedures not followed in removal based on conditions arising before appointment. *Munson v. Dep't of Justice*, 55 M.S.P.R. 246 (1992); *James v. Dep't of Army*, 55 M.S.P.R. 124 (1992).
 - (2) Negotiated Grievance Procedure: Not available to probationers to challenge removal. *Immigration and Naturalization Serv. v. FLRA*, 709 F.2d 724 (D.C. Cir. 1983).
3. Probationary Excepted Service employees.
- a. Predecisional rights: Same as Competitive Service. 5 U.S.C. 7511(a)(1) (B), (C)
 - b. Appeal and Grievance rights.
 - (1) MSPB: Only basis for appeal is partisan politics or marital status.
 - (2) Negotiated Grievance Procedure: No right to challenge action under the NGP. *Health and Human Services v. Fed. Labor Relations Auth.*, 894 F.2d 333 (9th Cir. 1990) (*per curiam*); *Dep't of Treasury v. FLRA*, 873 F.2d 1467 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 864 (1990); *Health and Human Services v. Fed. Labor Relations Auth.*, 858 F.2d 1278 (7th Cir. 1988).
4. Nonprobationary Competitive Service employees and Nonprobationary Excepted Service employees.

a. Predecisional Rights.

- (1) Performance-based removal or reduction in grade under 5 U.S.C. 4303(b). Thirty (30) days advance notice, representation, oral and written reply, and written decision.
- (2) Suspension for 14 days or less. 5 U.S.C. 7503(b): Advance notice, representation, right to review material relied upon, oral and written reply, written decision. NOTE: These predecisional rights apply only to competitive service employees, not excepted service.
- (3) "True" or Appealable adverse action. 5 U.S.C. 7513(b) Thirty (30) days advance notice, representation, right to review material relied upon, at least 7 days to submit written and oral reply (and/or hearing at agency's option), and written decision.

b. Appeal and Grievance Rights.

- (1) MSPB. 5 U.S.C. 4303(e) and 7513(d). Appeal available for removal and reduction in grade under Chapter 43 and for "true" adverse actions for misconduct under Chapter 75, CSRA. *Rosete v. Office of Personnel Mgmt.*, 48 F.3d 514 (Fed. Cir. 1995); *Forest v. Merit Systems Protection Bd.*, 47 F.3d 409 (Fed. Cir. 1995) (limited rights of appeal for excepted service employees are dictated by Civil Service Due Process Amendments); *Ferdon v. U.S. Postal Serv.*, 60 M.S.P.R. 325 (1994) (appeal to the MSPB is barred by election to process mixed case through EEOC complaint procedures).
- (2) Negotiated Grievance Procedure. When the collective bargaining agreement does not exclude "true" adverse actions (Chapter 75) and performance-based actions (Chapter 43) from the NGP, bargaining unit members **must elect** an MSPB appeal or a grievance under the NGP. Note: no MSPB appeal available for RIFs and denials of step increase when NGP covers those matters (see para 2d. on page 6). *Hayes v. Dep't of Labor*, 65 M.S.P.R. 214 (1995); *Capriles v. Panama Canal Comm'n*, 65 M.S.P.R. 221 (1994) (The MSPB may review arbitration decisions involving allegations of discrimination).

- (3) When the employee elects the NGP and case goes to arbitration, arbitrator is bound by MSPB precedent. 5 U.S.C. 7121(e)(2). In matters covered under Chapter 43 (performance) and Chapter 75 (misconduct) which have been raised under the NGP, judicial review shall apply to the award of an arbitrator in the same manner and under the same conditions as if the matter had been decided by the MSPB (exception to arbitrator awards filed with the U.S. Circuit Court of Appeals for the Federal Circuit). 5 U.S.C. 7121(f) and 7703(b)(1).
 - (4) Administrative grievance procedure (AGP). Actions appealable to the MSPB are not grievable under the AGP.
5. Office of Special Counsel (OSC) Actions. 5 U.S.C. 1207, 1212, and 2302(b); 5 C.F.R. Parts 1209 and 1800. Employees (except Schedule C excepted service employees and selected others exempted by law, regulation, or executive order) may seek to overturn a personnel action or stay a threatened personnel action that may amount to a prohibited personnel practice by filing a complaint with the OSC.

IV. MSPB APPEALS. 5 U.S.C. 7701; 5 C.F.R. PART 1201.

- A. Agency Decision Notice. 5 C.F.R. 1201.21.
 1. Contains notice of time limits, effect of missing time limits, and address for appeal. *Walls v. Merit Systems Protection Bd.*, 29 F.3d 1578 (Fed. Cir. 1994).
 2. A copy (or access to copy) of MSPB regulations.
 3. Appeal form (NEW MSPB form/Internet).
 4. Notice of grievance rights (if any).
- B. Employee Appeal. 5 C.F.R. 1201.22. The following rules of filing apply to **all** submissions to the Board (appellant or agency).

1. Methods of filing. Personal delivery, FAX, or mail. 5 C.F.R. 1201.22(d). The MSPB has amended its rules to allow for electronically filed appeals (e-Appeal). <https://e-appeal.mspb.gov/>
2. Date of filing. 5 C.F.R. 1201.4(1).
 - a. Personal delivery -- date of receipt by MSPB. *Cohen v. Dep't of Commerce*, 56 M.S.P.R. 578 (1993).
 - b. FAX -- date of receipt of fax (as recorded on transmission by receiving fax machine). *Jude v. Dep't of Treasury*, 52 M.S.P.R. 5 (1991).
 - c. Mail -- postmark (or presumption of 5 business days before receipt if no legible postmark). *Jordan v. Dep't of Treasury*, 64 M.S.P.R. 242 (1994). But see *Zicht v. Health and Human Servs.*, 56 M.S.P.R. 9 (1992); *Raphel v. Dep't of Army*, 50 M.S.P.R. 614 (1991).
 - d. Delivery by private express companies -- The MSPB previously found that filing by delivery company was a personal delivery rather than mail. Amended rules now treat these deliveries as similar to mail: filing is completed when the pleading is given to the delivery company. See 5 C.F.R. 1201.4(1). See also *McDavid v. Dep't of Labor*, 64 M.S.P.R. 304 (1994); *Ally v. Dep't of Navy*, 58 M.S.P.R. 680 (1993).
 - e. E-Appeal -- date the document is electronically submitted to the Board.
3. Time for filing -- 30 days.
 - a. Waiver of time requirement for good cause. 5 C.F.R. 1201.22(c). *Walls v. Merit Systems Protection Bd.*, 29 F.3d 1578 (Fed. Cir. 1994); *Anderson v. Dep't of Justice*, 999 F.2d 532 (Fed. Cir. 1993); *Crawford v. Dep't of State*, 60 M.S.P.R. 441 (1994).
 - (1) Employee has the burden of demonstrating good cause.

(2) Employee must show due diligence or ordinary prudence under the circumstances of the case.

(3) The only relevant factor is whether there is a "reasonable excuse"--any doubts should be resolved in favor of the employee (appellant). *Calfee v. OPM*, 64 M.S.P.R. 309 (1994); *Sanford v. Dep't of Defense*, 61 M.S.P.R. 207 (1994).

b. Discretion to grant evidentiary hearing on timeliness issue. See *Bagge v. Dep't of Navy*, 38 M.S.P.R. 326 (1988).

C. Acknowledgment Order.

1. Standard form.

2. Show Cause Orders: Jurisdictional issues. *Martinez v. Merit System Protection Bd.*, 126 F.3d 1480 (Fed. Cir. 1997).

D. Agency Response.

1. Time -- 20 days. 5 C.F.R. 1201.22(b).

2. Consequences of late filing. AJ may refuse to consider the matter untimely filed. 5 C.F.R. 1201.43(c). *Johnson v. Dist. of Columbia Bd. of Education*, 7 M.S.P.R. 652 (1981).

3. Content. 5 C.F.R. 1201.25.

a. Identity of parties.

b. Narrative response stating reasons for action.

c. Adverse action file.

d. Designation of agency representative.

e. Other documents or responses requested by the Board.

- NOTE: Documents submitted with the response become part of the record and need not be reintroduced into evidence during the hearing.

E. Motion Practice. 5 C.F.R. 1201.55.

1. Form.

2. Coordination with opposing party required before filing procedural motions, including extensions of time and postponing hearing.

3. Commonly asserted motions.

a. Motion to dismiss for lack of jurisdiction.

b. Motion for extension of time. 5 C.F.R. 1201.55(c).

c. Motion to postpone hearing. 5 C.F.R. 1201.51(c).

d. Summary judgment is precluded in MSPB cases with one exception. In *Redd v. USPS*, 101 MSPR 182 (2006), the Board decided that summary judgment may be used to dismiss, prior to hearing, EEO affirmative defenses that do not present a genuine issue of disputed material fact.

4. Time for opposition to written motions -- 10 days from service of motion.

F. Discovery. 5 C.F.R. 1201.71 - 75.

1. Purposes.

2. Scope.

a. Nonprivileged.

b. Relevant ("appears reasonably calculated to lead to the discovery of admissible evidence").

3. Methods.

a. Any method provided for in Federal Rules of Civil Procedure.

(1) Written interrogatories.

(2) Requests for production of documents.

(3) Requests for admission.

(4) Depositions.

b. Federal Rules of Civil Procedure are "instructive."

4. Procedures.

a. Discovery from a party. 5 C.F.R. 1201.73.

(1) Initial request -- within 25 days of acknowledgment order.

(2) Response or objection is due -- within 20 days of service of request.

(3) Follow up request are due -- within 10 days of service of prior response.

b. Discovery from a nonparty.

(1) Voluntary discovery when possible.

(2) Motion and order for discovery from nonparty.

(3) Response or objection -- within 20 days of service of request (voluntary) or 20 days from order for discovery.

(4) Follow up request -- within 10 days of service of prior response.

c. Motion to compel discovery.

(1) Filed within 10 days of date of service or objections (or 10 days after time limit for response expires).

(2) Content of motion to compel.

(a) Original request.

(b) Response and objections (or affidavit or declaration under 28 U.S.C. 1746 that no response has been received).

(c) Statement showing that information sought is relevant and material.

(3) Opposition to motion to compel - 10 days from date of service of motion.

d. Motion for protective order. 5 C.F.R. 1201.55(d).

NOTE: Agency counsel will frequently want to request the administrative judge to delay any discovery going to the merits of the case until after a jurisdictional issue has been resolved. See *Kostan v. Arizona Nat'l Guard*, 45 M.S.P.R. 173 (1990).

e. Sanctions for noncompliance with order compelling discovery. 5 C.F.R. 1201.43 and 1201.74(c).

(1) Adverse inference.

(2) Exclude evidence and testimony.

- (3) Permit use of secondary evidence.
 - (4) Rule against noncompliant party on issue.
- f. MSPB rule on case suspensions.
- (1) The MSPB amended its regulations to allow cases to be suspended for up to 60 days to allow the parties to pursue *discovery* or *settlement*. 5 C.F.R. 1201.28.
 - (2) Joint Requests. Parties may submit a joint request for additional time to pursue *discovery* or *settlement*. Upon receipt, the Administrative Judge (AJ) will suspend case processing for up to 30 days. The parties can jointly request an extension for up to an additional 30 days.
 - (3) Time for Filing. Must file within 45 days of the date of the acknowledgement order (or within 7 days of the appellant's receipt of the agency file, whichever is later). A request for an additional 30-day suspension must be made on or before the fifth day before the end of the first 30-day suspension period.
 - (4) Unilateral Requests. Either party may submit a request for additional time to pursue *discovery*. Granted at AJ's discretion.
 - (5) Untimely Requests. Granted at AJ's discretion.
 - (6) Early Termination of Suspension Period. The suspension period may be terminated prior to the end of the agreed upon period if the parties request the AJ's assistance relative to *discovery* or *settlement* during the suspension period and the AJ's involvement pursuant to that request is likely to be extensive.

G. Prehearing Submissions and Prehearing Conference(s).

1. Prehearing submissions. Binding on parties.

- a. Statement of facts and issues, including affirmative defenses.
 - b. Stipulations.
 - c. Witness list with summary of expected testimony.
 - d. Exhibits.
2. Prehearing Conference(s).
- a. Purposes.
 - (1) Facilitate discovery.
 - (2) Focus issues for resolution.
 - (3) Obtain stipulations.
 - (4) Rule on witnesses and exhibits.
 - (5) Discuss settlement.
 - b. Record of conferences.

H. Hearing.

- 1. Right to a hearing. Employee has statutory right. An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right— 1) to a hearing for which a transcript will be kept; and 2) to be represented by an attorney or other representative. 5 U.S.C. 7701(a).
- 2. Scheduling the hearing -- not earlier than 15 days after notice. 5 C.F.R. 1201.51.

3. Location. 5 C.F.R. 1201.51(d).
 - a. Approved locations. 5 C.F.R. Part 1201, Appendix III.
 - b. Motion to change location.
 - (1) Good cause -- a different location will be more advantageous to all parties and the Board.
 - (2) Standard of review -- prejudice: location affected substantive rights of parties. *Pope v. Dep't of Transportation*, 12 M.S.P.R. 93 (1982).
4. Order of hearing and burdens of proof. 5 C.F.R. 1201.56-.57.
 - a. Jurisdiction and timeliness of appeal.
 - (1) Employee has burden and presents case first.
 - (2) Preponderance of the evidence.
 - b. Performance-based and misconduct actions.
 - (1) Agency has burden.
 - (2) Performance-based action: substantial evidence.
 - (3) Misconduct-based action: preponderance of evidence.
 - c. Affirmative defenses -- employee has the burden of proof by preponderance of evidence.
 - d. Special Counsel actions. *Eidmann v. Merit Systems Protection Bd.*, 976 F.2d 1400 (Fed. Cir. 1992).
 - (1) Corrective action on behalf of employee. 5 U.S.C. 1214.

(2) Disciplinary action against supervisor. 5 U.S.C. 1215.

I. Record.

1. Content. 5 C.F.R. 1201.54.

a. Pleadings.

b. Orders and decisions.

c. Exhibits.

d. Verbatim record of testimony (tape recording or transcript). 5 C.F.R. 1201.53.

2. Closing the record. 5 C.F.R. 1201.58.

J. Initial Decision by Administrative Judge. 5 C.F.R. 1201.111.

1. Content.

a. Findings of fact and conclusions of law with reasons therefore.

b. Order making final disposition.

c. If employee prevails, statement regarding interim relief.

d. Date decision will become final (35 days after initial decision unless timely petition for review filed).

e. Review and appeal rights.

2. Interim Relief. 5 U.S.C. 7701(b)(2); 5 C.F.R. 1201.111(c).

a. Agency options.

- (1) Grant ordered relief.
 - (2) Place employee in paid, nonduty status if agency determines that employee's presence at worksite would be unduly disruptive. If the agency determines that returning an initially successful applicant to his/her previous position would prove unduly disruptive, nonetheless "such employee shall receive pay, compensation, and all other benefits as terms of conditions of employment during the period pending the outcome of any petition for review..." 5 U.S.C. 7701(b)(2)(B).
 - (3) *Scofield v. Dep't of Treasury*, 53 M.S.P.R. 179 (1992) (MSPB has no authority to review determination that reinstatement would be unduly disruptive).
 - (4) Detail or assign the employee to a position other than the former position, or return him to the former position with restricted duties. The employee must receive the same pay and benefits as in the former position. The agency decision is not subject to review for bad faith. *King v. Jerome*, 42 F.3d 1371 (Fed. Cir. 1994), reversing *Jerome v. Small Business Admin.*, 56 M.S.P.R. 181 (1993).
 - (5) The agency may reinstate employee under interim relief order by temporary appointment pending outcome of petition for review (PFR). *Avant v. Dep't of Navy*, 60 M.S.P.R. 467 (1994).
- b. Failure to produce evidence of compliance with 2a. above before the date the petition for review is due will result in dismissal of agency's petition for review. 5 C.F.R. 1201.115(b)(4). A determination that an agency has failed to comply with an order of interim relief will result in dismissal of the agency's PFR. *Wayne v. Dep't of the Navy*, 55 M.S.P.R. 322 (1992); See also *Shaishaa v. Dep't of Army*, 60 M.S.P.R. 359 (1994); *White v. U.S. Postal Serv.*, 60 M.S.P.R. 314 (1994); *Reid v. U.S. Postal Serv.*, 61 M.S.P.R. 84 (1994); *Harrell v. Dep't of Army*, 60 M.S.P.R. 164 (1993).
- c. Contentions that an agency failed to comply with an interim relief order should be raised in a motion to dismiss the agency's petition for review. *Nicoletti v. Dep't of Justice*, 53 M.S.P.R. 610 (1992).

- d. An order of interim relief remains in effect only until a final decision by the MSPB. *Griffin v. Dep't of the Army*, 68 M.S.P.R. 240 (1995).
 - e. KEY!! Do NOT cancel the underlying action if the Administrative Judge orders interim relief. The appeal then becomes moot! *Cain v. Defense Commissary Agency*, 60 M.S.P.R. 629 (1994); *Trotter v. Dep't of Defense*, 54 M.S.P.R. 563, 564 (1992).
3. Initial Decisions. According to 5 C.F.R. 1201.113, the initial decision of the Board would become final after 35 days, unless the plaintiff filed a petition for review by the full Board. *Daniels v. Dep't of Army*, 902 F.2d 32 (1990).
- K. Petition for review (PFR). 5 C.F.R. 1201.114-117.
- 1. Time limits.
 - a. PFR -- 35 days after initial decision issued. *Hall v. Dep't of Army*, 59 M.S.P.R. 161 (1993). A petition for review must be filed within 35 days after the issuance of the initial decision. 5 C.F.R. 1201.114(d).
 - b. The Board will waive the 35 day time limit only upon a showing of good cause for the delay in filing. 5 C.F.R. 1201.12, 1201.114(f). To establish good cause for the untimely filing of a petition, a party must show that he exercised due diligence or ordinary prudence under the particular circumstances of the case. See *Alonzo v. Dep't of Air Force* 4 M.S.P.R. 128 (1980).
 - c. Cross-petition for review -- 25 days after service of PFR.
 - d. Response to PFR or cross-petition -- 25 days after service of PFR or cross-petition.

2. Grounds for granting petition. 5 C.F.R. 1201.115(c). Merit Systems Protection Board reasonably applied its rules to permit review of field office presiding official's decision that government employee's suspension was tainted by supervisor's desire to retaliate against employee for earlier filing of unsuccessful complaint with Civil Service Commission. *Dunning v. NASA*, 718 F.2d 1170 (D.C. Cir. 1983).
 - a. New and material evidence.
 - b. Erroneous interpretation of law or regulation.
3. Proof of Interim Relief. The agency must provide tangible proof of compliance with an interim relief order. *Allen v. Dep't of the Interior*, 54 M.S.P.R. 116 (1992); *Hanner v. Dep't of Army*, 55 M.S.P.R. 113 (1992). Generally, standard personnel documents such as an SF 50 or SF 52, or a letter from a responsible agency official directing the employee to return to duty constitute acceptable evidence of compliance. *Farmer v. Dep't of Justice*, 58 M.S.P.R. 58 (1993).

L. MSPB Review of Initial Decision. 5 C.F.R. 1201.117.

1. Nature.
 - a. Written briefs.
 - b. Oral argument.
2. Action.

M. Intervention Before the Board. 5 C.F.R. 1201.34 and 1201.114(g).

1. Intervention of right.
 - a. Director, OPM.
 - b. Special Counsel.

2. Permissive intervenors -- anyone who will be directly affected by the outcome of the proceeding.
 3. Amicus curiae -- discretion of Board.
- N. OPM Petition for Reconsideration. 5 U.S.C. 7703(d); 5 C.F.R. 1201.119.
1. Grounds.
 - a. Board erred in interpreting civil service law, rule, or regulation affecting personnel management.
 - b. Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive.
 - NOTE: The MSPB may not question the authority of OPM to seek reconsideration; OPM may seek reconsideration whenever factual issues are in dispute. *King v. Lynch*, 21 F.3d 1084 (Fed. Cir. 1994), reversing *Newman v. Lynch*, 897 F.2d 1144 (Fed. Cir. 1990).
 2. Time -- 35 days after date of service of Board's order on the employing agency (generally not OPM).
- O. Judicial Review.
1. Review is by the U.S. Court of Appeals for the Federal Circuit (CAFC). 5 U.S.C. 7703; 5 C.F.R. 1201.120.
 2. The jurisdiction of the CAFC is concurrent with the jurisdiction of the Board. *Del Marcelle v. Dep't of Treasury*, 59 M.S.P.R. 251 (1993).

V. JUDICIAL REVIEW.

- A. Judicial Review of MSPB decisions involving Nonmixed cases. 5 U.S.C. 7703(b)(1).

1. United States Court of Appeals for the Federal Circuit (CAFC). *Rosano v. Dep't of Navy*, 699 F.2d 1315 (Fed. Cir. 1983); *Harris v. United States*, 13 Cl. Ct. 363 (1987).
2. Actions reviewable. In nonmixed cases, jurisdiction of the CAFC is identical to jurisdiction of the MSPB. *Cruz v. Dep't of Navy*, 934 F.2d 1240 (Fed. Cir. 1991); *Manning v. Merit Systems Protection Bd.*, 742 F.2d 1424 (Fed. Cir. 1984); 5 U.S.C. 7703(a)(1).
3. Actions not reviewable.
 - a. Actions not specified by law or regulation.
 - b. Refusal of Special Counsel to investigate/seek correction of alleged prohibited personnel practice.
 - Exception: Under the Whistleblower Protection Act of 1989, if the Special Counsel declines to seek corrective action of an alleged prohibited personnel practice under 5 U.S.C. 2302(b)(8) (reprisal for whistleblowing), the employee may bring an individual right of action (IRA) appeal to the MSPB and obtain judicial review of an unfavorable MSPB decision. 5 U.S.C. 1221(h).
4. Filing of Petition of Review of MSPB Decision.
 - a. A petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review must be filed within 60 days after the date the petitioner received notice of the final order or decision of the Board. *See* 5 U.S.C. 7703(b)(1).
 - b. Sixty-day limitations period for petition seeking judicial review of final order of Merit Systems Protection Board (MSPB) is not subject to equitable tolling, regardless of whether equitable tolling is applicable to companion 30-day limitations period for appeals from MSPB rulings in mixed cases. 5 U.S.C.A. 7703(b)(1, 2); *Oja v. Dep't of Army*, 405 F.3d 1349 (C.A.Fed. 2005).
5. Scope of Review. 5 U.S.C. 7703(c).

- a. Review of administrative record.
 - b. No *de novo* consideration of the evidence.
6. Standard of Review. 5 U.S.C. 7703(c).
- a. Arbitrary, capricious, or abuse of discretion, or otherwise not in accordance with law.
 - b. Obtained without procedures required by law, rule, or regulation having been followed.
 - c. Unsupported by substantial evidence.
 - d. The test requires only that the agency decision have a rational basis. *Grasso v. Internal Revenue Serv.*, 657 F.2d 224, 225 (8th Cir. 1981). Judicial review of dismissal from federal employment is limited to a determination that the applicable procedures have been complied with, that the dismissal was supported by substantial evidence, and that it was not arbitrary and capricious. *Ross v. U.S. Postal Serv.*, 664 F.2d 191, 192 (8th Cir. 1981); see *Romero v. Dep't of Army*, 708 F.2d 1561, 1563 (10th Cir. 1983). The issue before a reviewing court was whether, on the basis of the record, the Board could find that charges were supported by a preponderance of the evidence, or whether the Board decision was arbitrary, capricious, an abuse of discretion, or (insofar as factual matters were at issue) unsupported by substantial evidence. What this comes down to is whether or not the Board's decision is rational. *McDonough v. U.S. Postal Serv.*, 666 F.2d 647, 648 (1st Cir. 1981).
7. Agency request for judicial review of MSPB decisions. 5 U.S.C. 7703(d).
- a. Only the Director of the OPM may seek judicial review. Individual federal agencies have no right to judicial review absent action by the OPM. *Horner v. Burns*, 783 F.2d 196 (Fed. Cir. 1986).

- b. Director of the OPM may seek judicial review of the MSPB decision if he determines, in his discretion, that:
 - (1) The Board erred in interpreting a civil service law, rule, or regulation affecting personnel management; and
 - (2) The Board's decision will have a "substantial impact" on a civil service law, rule, regulation, or policy directive. *King v. Lynch*, 21 F.3d 1084 (Fed. Cir. 1994).
 - c. Director of OPM must either intervene before the MSPB or request reconsideration by the MSPB before seeking judicial review. *Horner v. Burns*, 783 F.2d 196 (Fed. Cir. 1986).
 - d. The MSPB must hear the OPM request on merits; it has no authority to scrutinize basis of OPM Director's request. *King v. Lynch*, 21 F.3d 1084 (Fed. Cir. 1994).
- B. Judicial review of claims of discrimination involving personnel actions not appealable to the MSPB ("Pure" Discrimination Claims).
1. U.S. District Court. 42 U.S.C. 2000e-5 and 2000e-17(c).
 2. Timing--within 90 days of receipt of final administrative decision. The 90-day period is not jurisdictional and may be subject to equitable tolling. 29 C.F.R. 1614.407.
 3. Proper defendant--the head of the agency (e.g., Secretary of the Army) is the only proper defendant. *Hancock v. Egger*, 848 F.2d 87 (6th Cir. 1988).
 4. Scope of review--trial *de novo* on claims raised administratively. *Chandler v. Roudebush*, 425 U.S. 840 (1976).
 5. Standard of Review--Plaintiff must prove discrimination by a preponderance of the evidence.
 6. Trial by jury available in cases of intentional discrimination. 42 U.S.C. 1981a.

- C. Judicial review of decisions in Mixed cases. 5 U.S.C. 7703(b)(2).
1. Jurisdiction in mixed cases lies in the appropriate U.S. District Court, not in the Court of Appeals for the Federal Circuit (CAFC). *King v. Lynch*, 21 F.3d 1084 (Fed. Cir. 1994);
 2. NOTE: The CAFC will not automatically transfer or dismiss an appeal that included an allegation of discrimination. The court *will review the* appeal and retain jurisdiction if the petitioner's discrimination claim is specious, inadequate, or not fairly at issue or the petitioner abandons the discrimination claim. *Hill v. Dep't of Air Force*, 796 F.2d 1469 (Fed. Cir. 1986); *Daniels v. U.S. Postal Serv.*, 726 F.2d 723 (Fed. Cir. 1984).
 3. Timing--within 30 days after plaintiff receives final administrative decision. 5 U.S.C. 7702; 5 C.F.R. 1201.175(b).
 4. Scope of Review--Bifurcated Scope.
 - a. Trial *de novo* on claims of discrimination (applying same standards and procedures as would be applied by district court in a nonmixed discrimination case).
 - b. "On the record" review of nondiscrimination issues (applying same standards and procedures the CAFC would apply in reviewing nonmixed case). *Morales v. Merit Systems Protection Bd.*, 932 F.2d 800 (9th Cir. 1991); *Rana v. United States*, 812 F.2d 887 (4th Cir. 1987); *Romain v. Shearer*, 799 F.2d 1416 (9th Cir. 1986).
- D. Constitutional Tort Action--attempt by federal employee to obtain judicial review of personnel actions not otherwise subject to judicial review.
1. Suits based on personnel actions and other matters covered by Civil Service Reform Act are preempted. *Bush v. Lucas*, 462 U.S. 367 (1983); *Steele v. United States*, 19 F.3d 531 (10th Cir. 1994) (finding FTCA suit by former Air Force employee for "whistleblowing" was preempted by the CSRA's comprehensive scheme of redress).

2. Personnel actions for which Congress provided no meaningful remedy under the Civil Service Reform Act. Where congressional failure to provide a meaningful remedy was intentional and not inadvertent, courts may not imply a *Bivens* remedy. *Schweiker v. Chilicky*, 487 U.S. 412 (1988). *Bivens*-type actions are not recognized against a federal agency, only against federal officers sued in individual capacities. *FDIC v. Meyers*, 510 U.S. 471 (1994).

VI. CONCLUSION.

CHAPTER K

Negotiated Grievance Procedures and Grievance Arbitration

I. INTRODUCTION.....	2
II. NEGOTIATED GRIEVANCE PROCEDURES	2
A. GRIEVANCE ARBITRATION	2
B. PUBLIC SECTOR ARBITRATION VS. PRIVATE SECTOR ARBITRATION	2
C. STATUTORY REQUIREMENTS FOR GRIEVANCE PROCEDURES	2
D. SCOPE AND COVERAGE.....	3
III. PUBLIC SECTOR ARBITRATION.....	4
IV. REVIEW OF ARBITRATION	5
A. EITHER PARTY	5
B. OTHER THAN AN AWARD RELATING TO A MATTER DESCRIBED IN § 7121(F)	6
C. TIME LIMITS	7
D. SCOPE OF REVIEW	8
E. GROUNDS FOR REVIEW	9
F. RECONSIDERATION	18
G. REMEDIES	18
H. COMPLIANCE.....	18
V. APPEAL OF GRIEVANCES UNDER § 7121(d).....	19
A. MIXED CASES	19
B. EEOC MATTERS	19
VI. JUDICIAL REVIEW OF FLRA ARBITRATION DECISIONS.....	19
A. ARBITRATION DECISIONS ARE GENERALLY NOT SUBJECT TO JUDICIAL REVIEW	19
B. ARBITRATION AWARDS THAT INVOLVE ULPS	19
C. REVIEW OF ARBITRATION AWARDS UNDER 5 U.S.C. § 7121(F)	19
VII. CONCLUSION.....	20

Administrative and Civil Law Department The Judge Advocate General’s Legal Center and School

I. INTRODUCTION.

- A. Grievance: "A complaint that is filed by an employee or the employee's union representative and that usu. concerns working conditions, esp. an alleged violation of a collective-bargaining agreement." Black's Law Dictionary (9th ed. 2009).
- B. Arbitration: "A method of dispute resolution involving one or more neutral third parties who are usu. agreed to by the disputing parties and whose decision is binding." Black's Law Dictionary (9th ed. 2009).

II. NEGOTIATED GRIEVANCE PROCEDURES UNDER THE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE.

- A. Grievance Arbitration. A procedure or proceeding resulting from the voluntary contractual agreement of labor and management pursuant to which the parties submit unresolved disputes to an impartial third party for decision whose decision they normally have agreed in advance to accept as final and binding.
- B. Public Sector Arbitration vs. Private Sector Arbitration.
- C. Statutory Requirements for Grievance Procedures. 5 U.S.C. §§ 7121(a)-(b).
 - 1. § 7121(a). Each collective bargaining agreement must have a grievance process.
 - 2. § 7121(b). Each grievance process must:
 - a. Be fair, simple, and expeditious.
 - b. Allow grievances by exclusive representative.
 - c. Allow grievances by employee on own behalf.

- d. Provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration that may be invoked by either the exclusive representative or the agency.

D. Scope and coverage.

- 1. Basic function: Grievance in the federal sector is expanded to include enforcing compliance with law and regulation as well as enforcing compliance with the collective bargaining agreement.
- 2. 5 U.S.C. § 7103(a)(9). Defines grievance as any complaint:
 - a. by any employee concerning any matter relating to the employment of the employee;
 - b. by any union concerning any matter relating to the employment of any employee;
 - c. by any employee, union, or agency concerning--
 - (1) the effect, interpretation, or a claim of breach of a collective bargaining agreement, or
 - (2) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment.
- 3. 5 U.S.C. §§ 7121(c)(1)-(5). Excludes grievances concerning five general matters from coverage by a negotiated grievance procedure:
 - a. Prohibited political activities;
 - b. Retirement, life insurance, or health insurance;
 - c. A suspension or removal for national security reasons;

- d. Examination, certification, or appointment; and
- e. The classification of any position which does not result in the reduction-in-grade or pay of an employee.
 - (1) When the substance of a grievance concerns the grade level of the duties assigned to, and performed by the grievant, the grievance concerns the classification of a position within the meaning of § 7121(c)(5).
 - (2) Where the substance of a grievance concerns whether the grievant is entitled to a temporary promotion by reason of having performed the established duties of a higher-graded position, the grievance does not concern the classification of a position within the meaning of § 7121(c)(5). SSA Office of Hearings and Appeals and AFGE Local 3627, 55 FLRA 778 (1999) (denying an agency's exceptions because the grievance concerned a claim that the grievants had performed work of a higher-graded position and was therefore arbitrable); AFGE Local 1617 and Kelly Air Force Base, 55 FLRA 345 (1999) (setting aside an arbitrator's award and finding that a grievance concerning a grievant's entitlement to a temporary promotion based on the performance of higher level work was arbitrable).

III. PUBLIC SECTOR ARBITRATION.

- A. Procedures.
 - 1. Only the exclusive representative or the agency may invoke binding arbitration. 5 U.S.C. § 7121(b)(1)(C)(iii).
 - 2. Cost.
 - 3. Selection of the arbitrator.
 - 4. Hearing.

IV. REVIEW OF ARBITRATION AWARDS BY THE FLRA UNDER 5 U.S.C. § 7122(A).

Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award pursuant to the arbitration (other than an award relating to a matter described in § 7121(f) of this title). If upon review the Authority finds that the award is deficient (1) because it is contrary to any law, rule, or regulation; or (2) on other grounds similar to those applied by Federal courts in private sector labor-management relation, the Authority may take such action and make such recommendations concerning the award as it considers necessary, consistent with applicable laws, rules, or regulations.

A. Either party.

1. A party is any person who participated as a party in a matter where the award of an arbitrator was issued.
 - a. Generally, only the union and the agency are entitled to file exceptions because they are the only parties to arbitration.
 - b. An agency's failure to attend the hearing does not preclude it from filing exceptions with the Authority. However, the Authority will not consider evidence that was not before the arbitrator. Dep't of Navy Mare Island and Federal Employees Metal Trades Council, 53 FLRA 390 (1997) (considering exceptions despite agency's failure to attend arbitration hearing); Golden Gate Nat'l Recreation Area and Laborers' Int'l Union of North America, Local 1276, 55 FLRA 193 (1999); Internal Revenue Service, 56 FLRA 393 (2000).
2. Employee is not a party and may not take exception. Oklahoma Air Logistics Center and AFGE, 49 FLRA 1068 (1994), *request for reconsideration denied*, 50 FLRA 5 (1994).

3. The Authority will not consider issues that could have been, but were not, presented to the arbitrator. 5 C.F.R. § 2429.5. See Panama Area Maritime Metal Trades Council and Panama Canal Commission, 55 FLRA No. 1199 (1999) (dismissing union's exceptions to arbitrator's award because they related to the agency's last best offer which was not raised at the arbitration); SSA Office of Hearings and Appeals and AFGE Local 3627, 55 FLRA 778 (1999) (refusing to consider a procedural argument raised by the agency because there was no evidence that the argument was raised before the arbitrator).

B. "Other than an award relating to a matter described in § 7121(f) of this title."

1. 5 U.S.C. § 7121(f) provides for review of § 4303 (unacceptable performance) and § 7512 (misconduct) matters, and similar matters, which arise under other personnel systems.
2. Review of awards relating to § 7121(f) matters.
 - a. The arbitrator makes the decision rather than the MSPB or EEOC. In deciding the case, the arbitrator must apply the same statutory standards as applied by the MSPB (or other appropriate agency). Things such as: the evidentiary standards and harmful error rule of § 7701(c) and the prohibitions of § 7701(c)(2) that an agency decision may not be sustained if based on a prohibited personnel practice or if not in accordance with law will apply. Cornelius v. Nutt, 472 U.S. 648 (1985) (harmful-error rule in arbitration).
 - b. Appeal is to the U.S. Court of Appeals for the Federal Circuit in an MSPB type case, or Federal Circuit Court of Appeals in an EEO type case. *See, e.g.,* Office and Prof'l Employees Int'l Union, Local 268 and U.S. Department of Energy, Oak Ridge, Tenn., 55 FLRA 775 (1999) (holding that a grievance claiming that the agency did not have a valid reason for rejecting the grievant's request to withdraw his buyout agreement and application for early retirement was related to a matter described in section 7121(f) over which it had no jurisdiction.)

- (1) Notwithstanding the rule that these decisions are not subject to review by the FLRA, the Authority has in the past reviewed such actions and reversed the arbitrator's decision granting back pay. AFGE, Local 2986 and U.S. DoD, National Guard Bureau, Oregon, 51 FLRA 1549 (1996); U.S. DoD, National Guard Bureau, Idaho and AFGE, Local 3006, 51 FLRA 1693 (1996).
 - (2) The District of Columbia Court of Appeals held the Authority's decisions were not reviewable, finding no violation of a clear statutory mandate. AFGE v. FLRA, 130 F.3d 450 (D.C. Cir. 1997). *But see* FAA v. Nat'l Assoc. of Air Traffic Specialists, 54 FLRA 235 (1998) (concluding Authority lacks jurisdiction to hear such actions).
- c. On the agency side, only the Director of OPM may obtain review. The Director must establish that the award misinterpreted civil service law or regulation and will have a substantial impact on civil service law and regulation. 5 U.S.C. § 7703(d); Devine v. Nutt, 718 F.2d 1048 (Fed. Cir. 1983), *rev'd as to other matters sub nom. Cornelius v. Nutt*, 472 U.S. 648 (1985).

C. Time limits.

1. 30-day Filing Period.

- a. Jurisdictional and cannot be waived or extended. 5 C.F.R. § 2429.23(d); Dept of Transportation Federal Aviation Administration and Nat'l Air Traffic Controllers Assn, 55 FLRA 293 (1999) (if agency fails to take exception to an arbitrator's award in a timely manner, it will be prohibited from collaterally attacking the award by raising a defense during a subsequent ULP hearing); Dept of Interior, BIA Billings Area Office and NFFE LOCAL 478, 38 FLRA 256 (1990), *motion for reconsid. denied*, 39 FLRA 238 (1991).
- b. Computation.

- (1) The 30-day period begins on the day the award is served. 5 C.F.R. § 2425.1(b).
- (2) Exception must be filed within 30 days unless the 30th day is a Saturday, Sunday, or Federal holiday or unless the award was served by mail.
 - (a) If the 30th day is a Saturday, Sunday, or Federal holiday, your exception must be filed by the next day that is not a Saturday, Sunday, or Federal holiday. 5 C.F.R. § 2429.21(a).
 - (b) If the award was served by mail, 5 days are added to the filing period after the 30-day period is first computed taking into account weekends and holidays. The additional 5-day period is also extended if the 5th day falls on a weekend or holiday. 5 C.F.R. § 2429.22.
- (3) Mailbox Rule. 5 C.F.R. § 2429.21(b).
 - (a) The date of the postmark is the day of filing.
 - (b) In the absence of a postmark, the date of filing is determined to be the date of receipt minus 5 days.
 - (c) IRS & Nat'l Treasury Employees Union, 44 FLRA 538 (1992) (Authority will not consider proof that a letter had been filed more than 5 days earlier).
- (4) Filing by personal delivery is accomplished the day that the Authority receives the documents.

D. Scope of Review.

1. Although Congress specifically provided for review of arbitration awards in § 7122(a), at the same time, Congress expressly made clear that the scope of that review is very limited.
2. The Authority will presume that the award should be accorded the binding status required by the Statute.
3. Only when it is established that the award is deficient as one of the specific grounds set forth in § 7122(a) will an award be found deficient.

E. Grounds for Review.

1. Contrary to any law, rule, or regulation. 5 U.S.C. § 7122(a)(1).
 - a. Awards contrary to law. *See, e.g.*, §§ 7106(a), 7116(d), 7121(d); NTEU and IRS, 40 FLRA 614 (1991); AFGE & HUD, 54 FLRA 1267 (1998).
 - (1) The Statute.
 - (a) No arbitration award may improperly deny the authority of an agency to exercise any of its rights. 5 U.S.C. § 7106(a); SSA and AFGE, 55 FLRA 1063 (1999) (denying agency exception because it elected to bargain permissive topics in the CBA and arbitrator simply enforced that election); Dept of Air Force Warner Robins Air Logistics Center and AFGE Local 987, 53 FLRA 1344 (1998) (denying agency exceptions where it had agreed to bargain over impact and implementation to mitigate adverse effects); Panama Canal Commission & Maritime Metal Trades Council, 52 FLRA 404 (1996); *see also IRS v. FLRA*, 110 S. Ct. 1623 (1990).

- (b) When, in the discretion of the aggrieved party, an issue has been raised under the ULP procedures, the issue subsequently may not be raised as a grievance. 5 U.S.C. § 7116(d); EEOC and AFGE, 48 FLRA 822 (1993); *but see* Point Arena Air Force Station and NAGE Local R12-85, 51 FLRA 797 (1996) *and* EEOC and AFGE, 53 FLRA 465 (1997) (Same facts may support both ULP and grievance where different legal theories apply).
 - (c) When an employee affected by prohibited EEO discrimination has timely raised the matter under an applicable statutory procedure, the matter subsequently may not be raised as a grievance. 5 U.S.C. § 7121(d); INS, El Paso and AFGE, Local 1929, 40 FLRA 43 (1991); US Dep't of Air Force & AFGE, 43 FLRA 290 (1991).
- (2) Back Pay Act, 5 U.S.C. § 5596.
- (a) Necessary findings. U.S. Department of Navy and Int'l. Assoc. of Machinists, 45 FLRA 1324 (1992); VA Medical Center Kansas City and AFGE Local 2663, 51 FLRA 762 (1996); Alabama Ass'n of Civilian Technicians and Alabama Nat'l Guard, 54 FLRA 229 (1998); United States Small Business Administration, 55 FLRA 179 (1999).
 - (i) Agency personnel action was unjustified and unwarranted.
 - (ii) Such action directly resulted in the withdrawal or reduction of the pay, allowances, or differentials of the grievant.
 - (iii) But for such action, the grievant would not otherwise have suffered such withdrawal or reduction of pay, allowances, or differentials.

- (b) Attorney fees: statutory requirements for award by an arbitrator. US Dep't of Defense & Federal Ed. Assoc., 54 FLRA 773 (1998).
 - (i) Unjustified personnel action resulting in loss of pay.
 - (ii) Fee award in conjunction with backpay award.
 - (iii) Reasonable and related to the personnel action.
 - (iv) In accordance with the standards of § 7701.
 - (a) Interest of justice.
 - (b) Fully articulated, reasoned decision.
- (c) Back pay awards that include allowances or differentials are limited to 6 years. *See* 64 Fed. Reg. 72457 (28 December 1999) (applying 6 year statute of limitations to include settlements of grievances and arbitrations).
- (d) US Dep't of Veterans Affairs & Nat'l Assoc. of Gov't Employees, 53 FLRA 1426 (1998) (Parties are not required to request, and arbitrator is not required to decide requests for, attorney fees before award of back pay becomes final).

- (e) In U.S. Department of Defense Dependents Schools and Federal Educ. Ass'n, 54 FLRA 514 (1998), the Authority held that an arbitrator may properly award attorney fees for the time spent litigating the entitlement to interest on back pay. The Authority determined that interest is an inseparable part of any payment under the Back Pay Act and that there is no requirement that a back pay award be in the same proceeding as the proceeding that determines the entitlement to attorney fees.

- (3) Environmental Differential Pay. AFGE Local 2004 and Defense Logistics Agency, 55 FLRA 6 (1998) (denying union's exceptions to arbitration award because arbitrator properly applied the asbestos standards used by OSHA as negotiated by parties). *But see AFGE, Local 1617 and Dept. of the Air Force, Kelly Air Force Base*, 58 FLRA No. 13 (2002) (holding that the arbitrator erred in not applying the asbestos standard in an agency regulation).

- b. Awards not subject to grievance and arbitration. 5 U.S.C. § 7121(c).
 - (1) Classification grievances. § 7121(c)(5). Where the substance of the grievance concerns the grade level of duties performed by the grievant and the grievant has not been reduced in grade or pay, the grievance is precluded. HUD and AFGE Local 3475, 53 FLRA 1611 (1998).

 - (2) Examination, certification, or appointment. § 7121(c)(4); U.S. Dept. of Defense and Overseas Ed. Assoc., 51 FLRA 210 (1995).

 - (3) Grade and pay retention matters. § 5366(b). When employees retain their grade and pay following certain reduction-in-force or reduction-in-grade actions, grievances are precluded over the action that was the basis for the grade and pay retention and over the termination of such benefits. U.S. Dept. of Vet. Affairs and AFGE Local 1915, 34 FLRA 580 (1990).

- (4) Management rights and scope of the negotiated grievance procedure. In U.S. Dep't of the Treasury, Bureau of Engraving and Printing, Washington, D.C. and National Treasury Employees Union, Chapter 201, 53 FLRA 146 (1997), the Authority clarified that there is a 2-prong test for determining whether an award is deficient as contrary to management's rights under section 7106(a): under Prong 1, the Authority will examine whether the award provides a remedy for a violation of either applicable law or a contract provision that was negotiated pursuant to section 7106(b); under Prong 2, the Authority will determine whether the award reflects what management would have done if it had not violated the applicable law or the 7106(b) provision.
- (a) Performance appraisal matters. Management rights are considered in connection with resolution of the grievance on the merits. Nat'l Federal of Fed. Employees & Bureau of the Census, 47 FLRA 812 (1993).
- (b) Contracting out. The decision to contract out is a management right governed by OMB Circular A-76, a government-wide regulation. Grievances concerning the decision to contract out or claiming a failure to follow A-76 are barred. AFGE Local 1345 and Fort Carson, 48 FLRA 168, 205 (1993); IRS v. FLRA, 996 F.2d 1246, 1250 (D.C. Cir. 1993).
- (5) Matters for exclusive resolution by the Authority.
- (a) Duty to bargain. Negotiability disputes over the extent of the duty to bargain must be resolved by the Authority. Arbitrators may not resolve them. 5 U.S.C. § 7117; Indian Educators Federation & Bureau of Indian Affairs, 53 FLRA 696 (1997).

- (b) Bargaining-unit status. An arbitrator is precluded from addressing the merits of a grievance whenever a grievability question has been raised regarding the bargaining-unit status of the grievant. Gen. Services Administration Region IX and AFGE, 44 FLRA 901 (1992).
- (6) Separation of probationary employees. Grievances are prohibited. Department of Justice, Immigration and Naturalization Service v. FLRA, 709 F.2d 724 (D.C. Cir. 1983); Nellis Air Force Base and AFGE Local 1199, 46 FLRA 1323 (1993); NEA Overseas Ed. Assoc. and U.S. Dept. of Defense, 53 FLRA 941 (1997).
- (7) Discipline of a National Guard civilian technician under § 709(e) of the Civilian Technicians Act of 1968. Grievances are prohibited. US Dep't of Defense & AFGE Local 3006, 51 FLRA 1693 (1996).
- (8) Discipline of a professional employee of the Department of Medicine & Surgery of the Department of Veterans Affairs. Grievances are prohibited. NFFE and Veterans Admin., 31 FLRA 360, 364 (1988), *remanded*, Veterans Admin. v. FLRA, No. 88-1314 (D.C. Cir. 9/27/88), *dec. on remand*, 33 FLRA 349 (1988).
- (9) Adverse actions against nonpreference-eligible, excepted service employees. The Authority held that grievances were permitted; the courts disagreed. HHS v. FLRA, 858 F.2d 1278 (7th Cir. 1988), *reversing NTEU and HHS, Region V*, 25 FLRA 1110 (1987). Legislation now permits grievances. Civil Service Due Process Amendments, Pub. L. No. 101-376, 104 Stat. 461 (1990).
- (10) Assessment of pecuniary liability. The Authority holds that nothing prevents an arbitrator from reviewing the assessment. AFGE Council 214 and AFLC, Wright-Patterson AFB, 21 FLRA 244 (1986).

- (11) Denials of within-grade increases. The grievance procedure is the exclusive procedure for employees in bargaining units. NTEU v. Cornelius, 617 F. Supp. 365 (D.D.C. 1985).
 - (12) An arbitrator may not review merits of an agency's security-clearance determination. Department of the Navy v. Egan, 108 S. Ct. 818 (1988); AFGE and Dept. of Education, 42 FLRA 527, 533 (1991); Stehney v. Perry, 101 F.3d 925 (3d Cir. 1996).
- c. Contrary to Law, the Privacy Act. Federal Correctional Facility, El Reno, Oklahoma and AFGE Local 171, 51 FLRA 584 (1995).
- 2. Awards contrary to regulation. Dept. of Army and AFGE, 37 FLRA 186 (1990); DODDS and OEA, 48 FLRA 979 (1993); AFGE Local 1164 and SSA Region I, 54 FLRA 856 (1998).
 - a. Only an arbitration award that conflicts with a regulation that governs the matter in dispute will be found deficient.
 - b. Government-wide regulations govern a matter in dispute unless they conflict with preexisting CBA provisions. If there is a conflict, the CBA will control until expiration of the agreement.
 - c. Agency regulations govern a matter in dispute only when the matter is not covered by a collective bargaining agreement.
 - 3. On other grounds similar to those applied by Federal courts in private sector labor-management relations. 5 U.S.C. § 7122(a)(2).
 - a. Arbitrator failed to conduct a fair hearing. US Dept. of Defense & AFGE Local 3407, 44 FLRA 103 (1992); US Dept. of Defense & Overseas Fed. of Teachers, 36 FLRA 861 (1990); Tidewater Virginia Federal Employees Metal Trades Council & US Dept. of Navy, 53 FLRA 1149 (1998).

- b. The arbitrator was biased or partial; the arbitrator was guilty of misconduct which prejudiced the rights of a party; or the award was obtained by fraud or undue means. AFLC Hill AFB and AFGE Local 1592, 34 FLRA 986 (1990).
- c. Award is incomplete, ambiguous, or contradictory so as to make implementation of the award impossible. Delaware National Guard and Association of Civilian Technicians, 5 FLRA 50 (1981); Antilles Consolidated Ed. Assoc and USDD, 38 FLRA 341 (1990).
- d. Arbitrator exceeded authority.
 - (1) The FLRA will find an award deficient when the arbitrator rendered the award in disregard of a plain and specific limitation on the arbitrator's authority. U.S. Dept. of Navy and AFGE Local 22, 51 FLRA 305 (1995).
 - (2) The Authority will find an award deficient when the arbitrator determines an issue not included in the subject matter submitted. Dept of Navy Puget Sound Naval Shipyard and AFGE Local 48, 53 FLRA 1445 (1998) (setting aside an award where the arbitrator rephrased the relevant issue, found grievant not entitled to a temporary position and yet awarded grievant with a temporary promotion and backpay); VA and AFGE, 24 FLRA 447 (1986); Bremerton Metal Trades Council and Puget Sound Naval Shipyard, 47 FLRA 406 (1993); USDHHS and Nat'l Treasury Employees Union, 54 FLRA 90 (1998).
 - (3) Arbitrators exceed their authority by extending an award to cover employees outside the bargaining unit or by ordering an agency to take an action beyond its authority. Bureau of Indian Affairs and NFFE, 25 FLRA 902 (1987). Oklahoma City Army Logistics Ctr. and AFGE Local 916, 46 FLRA 862 (1992).
 - (4) Arbitrators may also exceed their authority by extending an award to cover employees who did not file grievances. SSA and AFGE Local 3509, 53 FLRA 43 (1997).

- e. Award is based on a nonfact. U.S. Dept. of Defense and AFGE Local 916, 53 FLRA 460 (1997); U.S. Dept. of Army and AFGE Local 2022, 46 FLRA 1304 (1993).
- (1) The central fact underlying the award is clearly erroneous, but for which, a different result would have been reached.
 - (2) To find an award deficient, it should be shown that the alleged nonfact was:
 - (a) Central to the result of the award,
 - (b) That it was clearly erroneous, and
 - (c) That but for the arbitrator's misapprehension, the arbitrator would have reached a different result.
 - (d) Also, it should be shown that the arbitrator not only erred in the view of the facts, but that the sole articulated basis for the award was clearly in error and it should be shown that the evidence discloses a clear mistake of fact, but for which, in accordance with the expressed rationale of the arbitrator, a different result would have been reached. Redstone Arsenal & AFGE, 18 FLRA 374, 375 (1985).
- f. Award is contrary to public policy. Long Beach Naval Shipyard and FEMTC, 48 FLRA 612 (1993); Dep't of Veterans Affairs & AFGE Local 1963, 48 FLRA 1067 (1993).
- g. Award does not draw its essence from CBA. Antilles Consolidated Ed. Assoc. and U.S. Dept. of Defense, 50 FLRA 132 (1995).
- (1) Cannot in any rational way be derived from agreement;

- (2) is so unfounded in reason and fact, and so unconnected with the wording and purpose of the agreement, as to manifest an infidelity to the obligation of the arbitrator;
 - (3) evidence a manifest disregard for the agreement; or
 - (4) does not represent a plausible interpretation of the agreement.
- F. Reconsideration. 5 C.F.R. § 2429.17. A party seeking reconsideration after the Authority has issued a final decision or order has the heavy burden of establishing extraordinary circumstances exist to justify this unusual action. NTEU Chapter 208 and U.S. Nuclear Regulatory Commission, 55 FLRA 666 (1999) (denying union's motion because it failed to establish extraordinary circumstances); Scott Air Force Base, 50 FLRA 80, 86-87 (1995) (identifying the limited number of situations in which extraordinary circumstances have been found to exist).
- G. Remedies. The Authority may take such action and make such recommendations concerning the award as it considers necessary, consistent with applicable laws, rules, or regulations. 5 U.S.C. § 7122.
- H. Compliance. Compliance is required with final award and failure to comply is an unfair labor practice with no collateral attack on award permissible.
1. Award to which no exceptions or no timely exceptions are filed. Wright Patterson AFB and AFGE, 15 FLRA 151 (1984), *aff'd*, Dep't of the Air Force v. FLRA, 775 F.2d 727 (6th Cir. 1985); FAA and NATCA, 54 FLRA 480 (1998).
 2. Award as to which the Authority has denied exceptions. U.S. Marshals Service and AFGE, 13 FLRA 351 (1983), *enforced*, Marshals Service v. FLRA, 778 F.2d 1432 (9th Cir. 1985); Bureau of Prisons and AFGE, 20 FLRA 39 (1985), *enforced*, Bureau of Prisons v. FLRA, 792 F.2d 25 (2d Cir. 1986); FAA and NATCA, 54 FLRA 480 (1998).
 3. Award as to which timely exceptions have been filed and are pending. U.S. Army Armament Reserve and Nat'l Federation of Fed. Employees Local 1437, 52 FLRA 527 (1996).

V. APPEAL OF GRIEVANCES UNDER § 7121(d).

- A. Mixed Cases. The election of an employee to select the grievance process in no way prejudices the employee's right to ask the MSPB to review the final decision pursuant to § 7702 (Mixed Case Procedure) of the statute.
- B. EEOC Matters. The election of an employee to select the grievance process in no way prejudices the employee's right to ask the EEOC to review the final decision in any matter involving a complaint of discrimination of the type prohibited by any law administered by the EEOC.

VI. JUDICIAL REVIEW OF FLRA ARBITRATION DECISIONS.

- A. 5 U.S.C. § 7123(a). The Authority's arbitration decisions are generally not subject to judicial review. U.S. Dept. of Treasury and FLRA, 43 F.3d 682 (D.C. Cir. 1994).
- B. Arbitration Awards that Involve ULPs.
 - 1. Under 5 U.S.C. § 7123(a), a circuit court can review a final decision of the FLRA involving an arbitrator's award only if an unfair labor practice is involved. NTEU v. FLRA, 112 F.3d 402 (9th Cir. 1997).
 - 2. Although the precise meaning of § 7123(a) is still uncertain, the courts have generally construed the provision narrowly. U.S. Dept. of Interior v. FLRA, 26 F.3d 179 (D.C. Cir. 1994); Begay v. Dept. of Interior, 145 F.3d 1313 (Fed. Cir. 1998).
- C. Review of Arbitration Awards Under 5 U.S.C. § 7121(f).
 - 1. "In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure [MSPB performance or discipline cases] ... judicial review shall apply to the award of an arbitrator in the same manner and under the same conditions as if the matter had been decided by the Board."

- a. Court of Appeals for the Federal Circuit.
- b. Applicable case law. Cornelius v. Nutt, 472 U.S. 648 (1985).
- c. 5 U.S.C. § 7703(d). Director of OPM may obtain review.
- d. Grounds for Review. Same as for appealing final decision of MSPB.

VII. CONCLUSION.

CHAPTER L

Drafting Settlement Agreements

TABLE OF CONTENTS

I. INTRODUCTION.....	3
II. ADVANTAGES OF SETTLEMENT.....	3
A. PUBLIC POLICY FAVORS SETTLEMENT.....	3
B. SETTLEMENT NOT ALWAYS AN OPTION.....	3
III. CONTENT - WHO, WHAT, WHEN, WHERE, WHY, AND HOW.....	3
A. DEFINITION OF SETTLEMENT.....	3
B. SETTLEMENT AGREEMENTS AS CONTRACTS.....	3
C. CONSISTENT WITH LAW AND PUBLIC POLICY.....	4
D. ORAL V. WRITTEN.....	5
E. SETTLEMENT AUTHORITY.....	7
F. TIME FOR PERFORMANCE.....	8
G. RECISSION.....	8
H. ENFORCEMENT OF AGREEMENT.....	8
I. PRECEDENCE.....	9
IV. SPECIFIC TERMS AND CONDITIONS.....	9
A. PRIORITY CONSIDERATION.....	9
B. LAST CHANCE AGREEMENT (LCA).....	10
C. CLEAN RECORD/EXPUNGEMENT OF RECORDS.....	10
D. REINSTATEMENT OR REASSIGNMENT.....	11
E. SELF TRIGGERING PROVISIONS.....	11
F. SEVERABILITY CLAUSE.....	12
V. ATTORNEY'S FEES AND COSTS.....	12
A. EEOC - 29 CFR § 1614.501(E).	12
B. MSPB - 5 CFR § 1201.201.....	13
C. NEVER SEVER.....	13
D. ALWAYS ADDRESS FEES IN SETTLEMENT AGREEMENT.....	14
VI. COMPENSATORY DAMAGES.....	14
A. AVAILABILITY.....	14
B. TYPES OF COMPENSATORY DAMAGES.....	14
VII. CHALLENGES AND ENFORCEMENT.....	15
A. PROCEDURES.....	15
B. GROUNDS.....	15
C. CASES.....	15
D. REMEDIES.....	16

VIII. ARMY SETTLEMENT POLICY (EEO)--AR 690-600.....	17
A. COMPENSATORY DAMAGES	17
B. REPORTING REQUIREMENTS	18
C. ATTORNEY FEES	18
IX. PRACTICAL TIPS	18
A. COMPLY WITH OWBPA	18
B. DON'T MAKE PROMISES REGARDING TAX CONSEQUENCES	19
C. COORDINATE	20
D. AVOID CONFIDENTIALITY CLAUSES	20
E. BEWARE OF FUTURE PROMISES	20
F. ENSURE A MEETING OF THE MINDS	20
G. FIX THE PROBLEM.....	21
H. SEEK GLOBAL AGREEMENTS.....	21
I. CREATIVITY	21
J. EXECUTION	21
X. CONCLUSION.....	22

Administrative and Civil Law Department The Judge Advocate General's Legal Center and School

Drafting Settlement Agreements

I. INTRODUCTION.

II. ADVANTAGES OF SETTLEMENT.

A. Public Policy Favors Settlement. Title VII of the Civil Rights Act of 1964, section 717; 29 C.F.R. § 1614.603. *See, e.g.,* Chandler v. Roudebush, 425 U.S. 840 (1976); Sears Roebuck & Co. v. Equal Employment Opportunity Comm'n., 581 F.2d 941 (D.C. Cir. 1978); Shaw v. Library of Congress, 479 F.Supp. 945 (D.D.C. 1979); Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (rev. Nov. 9, 1999) (EEO MD-110) at 12-1. Pierce v. Department of the Interior, 104 M.S.P.R. 267 (2006).

1. Win-Win Solution v. Risk of Litigation.
2. Resolves Conflict.
3. Resource Savings.

B. Settlement Not Always a Viable Option.

III. CONTENT—WHO, WHAT, WHEN, WHERE, WHY, AND HOW.

A. Definition of Settlement. A voluntary agreement between an employee and an agency that brings closure to a dispute over a disciplinary or performance-based action or other matter related to conditions of employment.

B. Settlement Agreement (SA) Viewed as a Contract.

1. MSPB - The SA is a contract, and its interpretation is a matter of law. Greco v. Dep't of the Army, 852 F.2d 558 (Fed. Cir. 1988) (“Our task is to determine the intent of the parties at the time they contracted, as evidenced by the contract itself. Only if there is ambiguity should parole evidence be considered.” King v. Navy, 130 F.3d 1031 (Fed. Cir. 1997)) (The meaning of terms in a settlement agreement is a question of law and reviewed *de novo*. Anderson v. Dep't of Commerce, 243 F.3d 556 (Fed. Cir. 2000) *citing Greco*.)

2. EEOC - A SA between an EEO complainant and a federal agency is a contract subject to ordinary principles of contract interpretation and construction. In interpreting a SA, the EEOC has applied the contract principle known as the "plain meaning rule," which holds "it is the intent of the parties as expressed in the contract, not some unexpressed intention, that controls the contract's construction"; where a writing is unambiguous on its face, its meaning is determined from the four corners of the instrument without resort to extrinsic evidence. Vacanti v. Dep't of the Navy, EEOC Appeal No. 01A01356 (March 27, 2002); Gray v. USPS, EEOC Appeal No. 01A03346 (July 26, 2001); Harden v. USPS, EEOC Appeal No. 01A12589 (July 26, 2001); Herrington v. Dep't of Defense, EEOC Request No. 05960032 (December 9, 1996); Hyon v. USPS, EEOC Request No. 05910787 (December 2, 1991).

C. Consistent with Law and Public Policy.

1. Consideration.

- a. Yip v. USPS, EEOC Appeal No. 01A21290 (March 27, 2002). The operative portion of the settlement agreement provided: "Both parties agree that, in order to promote a more harmonious relationship in the workplace, they will deal with each other fairly and treat each other with dignity and respect in the workplace." EEOC voided SA for lack of consideration.
- b. Tamura-Wageman v. Dep't of the Army, EEOC Appeal No. 01A11459 (March 7, 2002). EEOC held that consideration need not be great, but requires that "some right, interest, profit, or benefit accrues to one party or some forbearance, detriment, loss, or responsibility is given, suffered, or undertaken by the other. Where the promisor receives no benefit and the promisee suffers no detriment, the whole transaction is a *nudum pactum*."
- c. DuBois v. Social Security Administration, EEOC Request No. 05950808 (September 26, 1997). SA not binding because complainant did not receive valid consideration. Agency agreed simply to rate complainant fairly.
- d. Morita v. Dep't of the Air Force, EEOC Request No. 05960450 (December 12, 1997). SA set aside because agency incurred no legal detriment. Agency agreed to affirm that discrimination on any basis except performance is unacceptable and will not be tolerated; investigations of fraud and wrongdoing would not be based on race or ethnic origin; and investigations would be conducted IAW DoD and AF directives.

- e. Brionez v. Dep't of Agriculture, EEOC Request No. 05960492 (October 14, 1999). EEOC generally does not concern itself with adequacy or fairness of consideration, provided some legal detriment is incurred as part of the bargain. The parties must commit themselves to do something they were not already obligated to do, or the SA must be set aside for lack of consideration. The complainant here withdrew his informal class complaint. In return, the agency agreed to open new positions for recruitment and hiring and to undertake new obligations regarding career development, training, promotion, transfer, selection, retention, and evaluation. The agency thereby incurred a legal detriment as part of the bargain.
- f. McCloud v. USPS, EEOC Appeal No. 01960089 (March 6, 1998). Agency breached SA by failing to remove SF-50 from employee's OPF (the SA simply provided that the letter of removal would be stricken from the OPF)--intent of agreement clearly clean record. Enforcing only the letter of the SA would mean the agency provided no consideration.
- g. Martinez v. USPS, EEOC Appeal No 01A41314 (April 26, 2004). Agency's agreement to provide complainant with an accurate, updated job offer that accommodated the restrictions articulated by her doctor provided complainant with nothing more than that to which she was entitled as an employee OWCP. Dates for compliance with various stages of the job offer had expired; agreement unenforceable. Commission directed reinstatement.

- 2. Public Policy. Settlement agreement can waive current complaint rights, but not right to file complaint over future discrimination. Mello v. USPS, EEOC Appeal No. 01944734 (August 10, 1995) (Provisions in SA that waive the right of a complainant to bring an EEO claim on a prospective action are void as against public policy. A knowing waiver made without duress of a pending EEO action concerning a prior removal is valid, but waiver of an EEO claim concerning a possible future removal is invalid.); Perry v. Dep't of Veterans Affairs, EEOC Request No. 05960021 (August 8, 1996) (Provisions in the SA that waive the right of a complainant to bring an EEO complaint on a prospective action are void as against public policy.)

D. Oral v. Written.

- 1. 29 CFR § 1614.603. Any settlement reached shall be in writing and signed by both parties and shall identify the claims resolved.
- 2. Davis v. Dep't of Transportation, EEOC Request No. 05950023 (January 26, 1996). Terms of settlement read into the record constitute a binding agreement.

3. Anderson v. Environmental Protection Agency, 81 M.S.P.R. 618 (1999). SA recited into the record and the AJ asked appellant whether the terms as stated were correct. The Board found no evidence of coercion and upheld the SA, ordering appellant to comply with the terms of the agreement.
4. Thomas v. Smithsonian Institution, EEOC Appeal No. 01965078 (May 16, 1997), request for reconsideration denied, September 25, 2000. Under the theory of detrimental reliance, EEOC sustained an oral SA because there was no dispute of the terms, despite the agency's argument that there was no binding SA to enforce since there was no written agreement.
5. Thompson v. USPS, EEOC Appeal No. 01996352 (July 26, 2001). All terms of settlement were agreed to, but SA was never reduced to writing. EEOC found there was no binding agreement.
6. Lind v. USPS, EEOC Appeal No. 01A14196 (December 17, 2001). Agency and Complainant agreed to settle during hearing before EEOC AJ and recorded terms on the record, agreed to "more fully elaborate" in a written SA, but no written SA was ever signed. Agency offered payment as agreed. EEOC found binding agreement.
7. Sargent v. Dep't of Health and Human Services, 229 F.3d 1088, 1090 (Fed. Cir. 2000). An oral agreement is binding absent a showing that the parties "did not intend to be bound until a written contract was signed." Unless the record clearly states there would be no agreement "until and unless" a written agreement was executed, an oral agreement read into the record is enforceable against the parties. Mahboob v. Dep't of Navy, 928 F.2d 1126 (Fed. Cir. 1991) (finding oral agreement enforceable); *accord*, Martin v. Dep't of Air Force, 91 M.S.P.R. 36 (2002) (rejecting agency's argument that it was free to alter terms of agreement read into record because it did not intend to be bound).
8. Tiburzi v. Dep't of Justice, 269 F.3d 1346 (Fed. Cir. 2001). The court rejected the appellant's claim that no binding agreement resulted from a settlement read into the administrative record. The AJ solicited consent of both parties to the terms of the agreement; the agency's subsequent modification of one term in a written agreement was a proposal for modification of the binding SA.
9. Greene v. Rumsfeld, 266 F. Supp.2d 125 (D.D.C. 2003) The employer asserted that the employee agreed to a settlement involving a retroactive promotion, and award of damages and attorney fees, and immediate retirement with a monetary separation incentive. The court held that the parties reached an enforceable oral agreement incorporating all material terms and evidencing an intent of the parties to be bound.

E. Settlement Authority.

1. Authority from the Agency. Epstein v. Dep't of Health and Human Services, EEOC Request No. 05970671 (July 2, 1998). Parties entered into a SA before an EEOC AJ, and the terms were read into the record. The agency's lawyer agreed to give complainant a letter of apology signed by the agency's Secretary. Before the agreement was reduced to writing, the agency advised complainant that it would not produce a letter of apology. The EEOC found that the agency breached the agreement and ordered reinstatement of the complaint and payment of attorney's fees and costs.
2. Authority under Law and Policy. Date of resignation under SA is controlling for determining retirement entitlements. Office of Personnel Management - Guidelines for Settlement of Federal Personnel Actions (<http://www.opm.gov/policy-data-oversight/settlement-guidelines/>).
 - a. The retirement fund is not a litigation settlement fund.
 - b. A settlement may not provide retirement benefits beyond what a court or administrative body could order as relief in the litigation.
 - c. A settlement cannot be implemented which conflicts with express provisions of CSRS or FERS.
 - d. Settlement of personnel actions should include consideration of the total cost to the Government.
 - e. Agencies must make all employee and employer contributions to employee benefits programs under a settlement.
 - f. There are special considerations in settlement of cases involving reemployment or back pay of an annuitant.
3. Parker v. Office of Personnel Management, MSPB No. 93 M.S.P.R. 529 (2003). A settlement agreement itself may not impose duties or obligations on a third party without that party's agreement. With respect to a settlement agreement to which OPM is not a party, OPM has the authority to determine whether any separation date established by the agreement is an artifice designed to evade the statutory requirements for entitlement to an annuity.
4. Authority/legality is different from advisability; don't fold just because someone doesn't like it.

- F. Time for Performance. In the absence of specific time for performance stated in the agreement, the parties must fulfill the terms of the agreement within a reasonable time. Gordon v. USPS, EEOC Appeal No. 01A11174 (July 26, 2001). (three months to clean record and arrange transfer deemed reasonable); Lorna Lee v. Dep't of Army, EEOC Appeal No. 01995591 (March 22, 2002) (two months to obtain payment of attorney fees reasonable). **Practice Tips:** 1. When the agreement requires the appellant/complainant to provide information (back pay, employment history, signed statement, or other), make the time for agency performance begin upon receipt of all information and documentation; 2. When settlement agreement includes terms for performance by non-agency activity (e.g., DFAS), agreement should include only promises over which agency has control (“the agency will prepare and submit to DFAS all documents necessary to authorize payment within 30 days”).
- G. Rescission. “It is well-established that in order to set aside a settlement, an appellant must show that the agreement unlawful, was involuntary, or was the result of fraud or mutual mistake.” Sargent v. Dep't of Health & Human Servs., 229 F.3d 1088, 1091 (Fed. Cir. 2000). A SA can also be rescinded for material breaches. See King v. Dep't of the Navy, 178 F.3d 1313 (Fed. Cir. 1998), *citing* Thomas v. Department of Housing and Urban Dev., 124 F.3d 1439, 1442 (Fed. Cir. 1997) (expunging record 6 years after SA entered did not constitute material breach without a showing of harm).
- H. Enforcement of Agreement.
1. MSPB.
 - a. The MSPB retains jurisdiction over an agreement for purposes of enforcement when it is entered into the record. Manley v. Dep't of Air Force, 91 F.3d. 117 (Fed. Cir. 1996).
 - b. The Board does not have the power to enforce an agreement against a third party without its consent; performance of a specific term is excused on the ground of impossibility when the appellant chooses not to rescind the agreement. Foreman v. Dep't of Army, 241 F.3d 1349 (Fed. Cir. 2001) (Army agreed to register an employee in DOD priority placement program but the employee was not eligible under DOD rules and DOD refused to accept registration; court found that DOD and Army were separate legal entities by law.) **Practice Tip:** Require the appellant to notify the agency and allow it an opportunity to cure nonperformance.

2. EEOC.

- a. In enforcing the terms of a settlement agreement, the EEOC will apply common rules of contract enforcement. Gilmore v. USPS, EEOC Appeal No. 01A10815 (March 14, 2002) (“failure to satisfy a time frame specified in a settlement agreement does not prevent a finding of substantial compliance, especially when all required actions were subsequently completed”); Haas v. Dep’t of Navy, EEOC Appeal No. 01A13426 (September 25, 2001) (finding any agency breach had been cured before petition for enforcement).
- b. Clark v. Dep’t of Veterans Affairs, EEOC Appeal No. 01A44177 (November 10, 2004). It is the intent expressed in the agreement that controls the contract construction and not the unexpressed intention. Agency tendered \$20,000 for Complainant’s agreement to withdraw any current EEO complaints. Agreement did not address Complainant’s FTCA claim.

I. Precedence. An examination of MSPB decisions confirms that its reluctance to consider employees whose disputes were resolved by settlement as similarly situated is not inflexible; it is a general policy that may be and had been overridden by other considerations. In Spahn v. Department of Justice, 93 M.S.P.R. 195 (2003), the appellant was treated less favorably than similarly situated employees who were offered settlement agreements or were permitted to resign. For other employees to be determined similarly situated, the Board has held that all relevant aspects of the appellant’s employment situation must be “nearly identical” to those of the comparative employees.

IV. SPECIFIC TERMS AND CONDITIONS.

A. Priority Consideration.

1. Wilson v. EEOC, EEOC Appeal No. 01881684 (October 10, 1989). Agency breached SA that provided that complainant be given priority consideration in advance of any formal action to recruit. Agency initiated recruitment by posting a vacancy announcement before first considering complainant. Even though no other applicants had yet been selected, EEOC viewed this as a material breach.

2. Bush v. Dep't of the Army, EEOC Appeal No. 01960709 (February 2, 2000). The EEOC found the agency breached the SA when it failed to give complainant priority consideration for the next available GM-1740-14 Education Services Specialist or Supervisory Education Services Specialist vacancy. Selecting official determined that complainant was "not qualified" to be selected when referred by priority consideration; if he was not qualified, he did not receive *bona fide* priority consideration. EEOC ordered specific performance by directing the agency to provide complainant one *bona fide* priority consideration for the first position for which complainant is qualified that becomes available.

B. Last Chance Agreement (LCA).

1. Anderson v. Dep't of Commerce, 243 F.3d 556 (Fed. Cir. 2000). 30 day suspension for sexual harassment held in abeyance for 2 years during mandatory counseling and agreement not to engage in such behavior. Discipline for "subsequent acts" of misconduct not covered by waiver of appeal rights. Suspension was imposed when employee made lewd remarks to female. Federal Circuit held this constituted breach of agreement, not subsequent misconduct.
2. Smith v. Dep't of Veteran Affairs, 78 M.S.P.R. 594 (1998). Waiver of appeal rights must be clear, unequivocal, and decisive. LCA from proposed removal put employee on PIP. Board unable to find any language in SA that appellant waived appeal rights for future violations of the LCA; no clear waiver of jurisdiction, appeal reinstated.
3. Mello v. U.S. Postal Service, EEOC No. 01944734 (August 10, 1995). EEOC enforced a LCA that contained an illegal prospective waiver provision regarding EEO rights, finding that it did not affect the validity of other portions of the SA.
4. Burchett v. USPS, EEOC Appeal No. 01A01893 (July 25, 2001), *reconsideration denied*, February 23, 2002. Appellant entered a firm choice agreement with Agency with provision requiring that he pass a psychological fitness for duty exam. After the Appellant failed exam, Agency removed him. EEOC found waiver of rights in MSPB agreement clearly applied to EEOC proceedings and approved agency FAD dismissing complaint for lack of jurisdiction
5. Gibson v. Dep't of Veterans Affairs, 160 F.3d 722 (Fed. Cir. 1998). The court upheld the Board's dismissal of Gibson's appeal for lack of jurisdiction, stating that the appeal of his removal was precluded by terms of the LCA. The concurring opinion contains a very interesting discussion of LCAs and allocation of the burden of persuasion.

6. Buchanan v. Dep't of Energy, 247 F.3d 1333, 1338 (Fed. Cir. 2001), *citing Link v. Dep't of Treasury*, 51 F.3d 1577, 1582 (Fed. Cir. 1995). "To overcome such a waiver, an employee must prove either compliance with the last-chance agreement, that the agency breached the agreement, or that the employee did not knowingly and voluntarily enter into the agreement."

C. Clean Record/Expungement of Records.

1. Pagan v. Dep't of Veterans Affairs, 170 F.3d 1368 (Fed. Cir. 1999). The court found that the agency violated the terms of a SA that provided appellant was to receive a "clean record" - all charges and actions would be removed from his personnel file. Providing written reference that implied disciplinary history was inconsistent with clean record settlement.
2. Rice v. Dep't of Veteran Affairs, EEOC Appeal No. 05950371 (May 9, 1996). Agency did not violate a term of SA stating that OPF would be purged of any and all adverse actions, records and other documents when agency retained his "boarding file."
3. McCloud v. USPS, EEOC Appeal No. 01960089 (March 6, 1998). Agency breached SA by failing to remove both the letter of removal and the SF-50 documenting the removal, although the SA simply provided that the letter of removal would be stricken from the OPF.

D. Reinstatement or Reassignment.

1. Gullette v. USPS, 77 M.S.P.R. 459 (1998). Agency breached SA by reassigning appellant to another position 2 years after execution. SA was silent with regard to the duration of performance.
2. Parker v. Dep't of Defense, EEOC Appeal No. 05910576 (August 30, 1991). SA that did not specify length of service for position to which complainant was placed was not breached by her temporary detail two years after date of execution. The EEOC rejected the notion that the agency, via the SA, forever bargained away its right to reassign complainant to another position.
3. Smith v. Dep't of Trans., EEOC Appeal No. 01994230 (January 6, 2000). Agency did not breach SA when it temporarily removed complainant from a position she was placed in pursuant to SA. The SA did not provide for a specific time period in which complainant would remain in the position.
4. Small v. USPS, EEOC Appeal No. 01983946 (January 13, 2000). Agency breached SA when it failed to place complainant in a designated position.
5. Handy v. Dep't of Trans., EEOC Appeal No. 04950012 (February 23, 1996). In non-selection cases, complainant should be placed in the position applied for or in a substantially equivalent position - one that is similar in duties, responsibilities, and location.

6. EEOC decisions recognize bumping of an incumbent employee as a possible remedy for discrimination. Myers v. USPS, EEOC Appeal No. 04950028 (May 2, 1996).
- E. Self-triggering Provisions. Anderson v. Environmental Protection Agency, 81 M.S.P.R. 618 (1999). Agency may consider the SA to be appellant's voluntary resignation, given her refusal to comply with the Board's order to submit a written resignation (but don't put yourself in this position!!).
- F. Severability Clause. Agreement should include language that the parties agree that in the event it is determined that a provision(s) of this settlement agreement is contrary to law or regulation or is otherwise unenforceable, only that provision(s) shall be considered null and void and all other provisions shall remain in full force and effect. Severability clauses allow for voiding provisions without busting entire agreement.

V. ATTORNEY'S FEES AND COSTS.

- A. EEOC - 29 CFR § 1614.501(e).
 1. In a decision or final action, the agency, administrative judge, or Commission may award the applicant or employee reasonable attorney's fees (including expert witness fees) and other costs incurred in the processing of the complaint. This provision applies to allegations of discrimination prohibited by Title VII and the Rehabilitation Act. NOTE: Federal sector complainants cannot obtain attorney's fees for the administrative processing of age discrimination claims.
 2. Prevailing Party. Absent an express waiver, the question of entitlement to attorney's fees turns on whether complainant is a prevailing party. Parks v. Dep't of the Air Force, EEOC Appeal No. 05880609 (June 27, 1988); Davis v. Dep't of Trans., EEOC Appeal No. 05970101 (February 4, 1999). An individual may be considered a "prevailing party" for purposes of Title VII even if there is no formal adjudication of the complaint and no finding of discrimination. Hewitt v. Helms, 482 U.S. 755 (1987). A prevailing party for purposes of obtaining attorney's fees is one who succeeds on any significant issue, and achieves some of the benefits sought in bringing the action. Morales v. U.S. Information Agency, EEOC Appeal No. 01956779 (December 3, 1997).

3. “In federal EEO law, there is a strong presumption that a complainant who prevails in whole or in part on a claim of discrimination is entitled to an award of attorney's fees and costs. More specifically, complainants who prevail on claims alleging discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, and the Rehabilitation Act of 1973, as amended, are presumptively entitled to an award of attorney's fees and costs, unless special circumstances render such an award unjust.” Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (rev. Nov. 9, 1999) (EEO MD-110) [emphasis omitted] at 11-1.
 4. “To determine the proper amount of the fee, a lodestar amount is reached by calculating the number of hours reasonably expended by the attorney on the complaint multiplied by a reasonable hourly rate [prevailing in the relevant community].” Donelson v. Dep’t of Veterans Affairs, EEOC Appeal No. 01996394 (July 27, 2001), *citing* Blum v. Stenson, 465 U.S. 886 (1984); Hensley v. Eckerhart, 461 U.S. 424 (1983). Counsel for the prevailing party must make a "good faith effort to exclude from a fee request hours that are excessive, redundant or otherwise unnecessary." Hensley, 461 U.S. at 434. Where a complainant does not prevail on every issue, fees are only available for the work that was performed with regard to the issue on which the complainant prevailed. The hours spent on unsuccessful claims should be excluded in considering the amount of a reasonable fee where the unsuccessful claims are distinct from the successful claims. Hensley, 461 U.S. at 43.
 5. An attorney who represents federal employees at a reduced hourly rate based on public interest motives can recover fees at the higher prevailing market rate, notwithstanding a retainer agreement. Lal v. Securities & Exchange Comm’n, EEOC Appeal No. 01974652 (February 2, 2000), *citing* Morales v. USIA, EEOC Appeal No. 01956779 (December 3, 1997); Erickson v. Dep’t of the Army, EEOC Appeal No. 01944011 (March 12, 1996).
- B. MSPB - 5 CFR § 1201.201. The Board applies a prevailing party standard. Buckhannon v. W. Va. Dep’t of Health & Human Serv., 532 U.S. 598 (2001). The “catalyst theory” does not support award of attorney’s fees under the American Rule; a “prevailing party” is one who is awarded relief by the court. Accord, Nichols v. Veterans’ Admin., 89 M.S.P.R. 554 (2001); Sacco v. DOJ, 90 M.S.P.R. 225 (2001). NOTE: There are seven separate statutory provisions that authorize MSPB to pay attorney's fees; know which one applies to your case.
- C. NEVER SEVER. When settling a dispute that will include payment of some attorney fees, always come to an agreement on fees before “settling.” Litigation over fees will often be just as bad (or worse), last as long (or longer), as (than) contesting the underlying action. See, e.g., Congelton v. Dep’t of Justice, EEOC Appeal No. 01A04726 (March 22, 2002); Willis v. USPS, 245 F.3d 1333 (Fed. Cir. 2001), *on remand* 89 M.S.P.R. 85 (2001); Cole v. U.S. Postal Service, EEOC Appeal No. 04950009 (June 19, 1997).

1. Army policy - Without the approval of the Chief, Labor and Employment Law Division, Office of The Judge Advocate General, activities may not sever the issue of attorney's fees from settlement of the merits.
 2. Goal of settlement is to resolve complaint - if you fail to resolve all matters, you can end up litigating forever.
- D. When settling, ALWAYS address fees—do not let the SA be silent on issue. *See Horn v. Dep't of Defense*, 81 M.S.P.R. 652 (1998), *aff'd* 230 F.3d 1374 (Fed. Cir. 1999). Best to state the amount of fees, to whom the check is made payable, where the check will be sent, and when payment will be made (process initiated, for DOD agencies processing through DFAS).

VI. COMPENSATORY DAMAGES.

A. Availability.

1. MSPB - 5 CFR § 1201.201(d). *Compensatory damages* awarded to a prevailing party who is found to have been discriminated against based on race, color, religion, sex, national origin, or disability. Compensatory damages include pecuniary losses, future pecuniary losses (not including front pay), and nonpecuniary losses, such as emotional pain, suffering inconvenience, mental anguish, and loss of enjoyment of life.
2. MSPB - 5 CFR § 1201.201(c). *Consequential damages* may be awarded in two situations - where the Board orders corrective action in a whistleblower appeal under 5 USC § 1221 and where the Board orders corrective action in a Special Counsel complaint under 5 USC § 1214. Consequential damages include such items as medical costs and travel expenses, and any other reasonable and foreseeable consequential damages.
3. EEOC - Civil Rights Act of 1991, Section 102. Compensatory damages may be awarded for pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life. NOTE: Federal sector complainants cannot recover compensatory damages for age discrimination claims or in Rehabilitation Act cases in which the agency made a good faith effort to accommodate the complainant's disability.

B. Types of Compensatory Damages.

1. Past Pecuniary - monetary expenses incurred, including job-hunting expenses, moving expenses, medical expenses, physical therapy expenses, and other quantifiable expenses. NOTE: These monetary claims are not subject to the \$300K cap (front pay also not subject to cap).
2. Future Pecuniary - monetary expenses that are likely to occur after resolution of a complaint, such as the projected cost of physical and/or psychiatric therapy.

3. Nonpecuniary - monetary compensation for intangible injuries, such as emotional distress, loss of self-esteem, anxiety, fatigue, humiliation, injury to reputation, embarrassment, depression, sleep problems, paranoia, pain and suffering, loss of enjoyment of life.

VII. CHALLENGES AND ENFORCEMENT.

A. Procedures.

1. MSPB - Petition for enforcement - 5 CFR § 1201.182. Most petitions fall under the Board's appellate jurisdiction and the petition must be filed with the regional or field office that issued the initial decision. If seeking enforcement of a final Board decision or order issued under its original jurisdiction, the petition for enforcement must be filed with the Clerk of the Board.
2. EEOC – Compliance with settlement - 29 CFR § 1614.504. Complainant shall notify the EEO Director (EEOCCR in Army) in writing within 30 days of when the complainant knew or should have known of the alleged noncompliance. Complainant may appeal to the EEOC 35 days after serving notice to the agency, or within 30 days of receipt of the agency's noncompliance determination.

B. Grounds. Bad faith, coercion, mutual mistake, lack of authority, diminished capacity, emotional distress, duress, fraud, etc. Wade v. Dep't of Veteran Affairs, 61 M.S.P.R. 580, 583 (1994) (“To set aside a settlement, an appellant must show that the agreement is "unlawful, was involuntary, or was the result of fraud or mutual mistake"). *See also*, Harris v. Dep't of Veteran Affairs, 142 F.3d 1463, 1468 (Fed. Cir. 1998); Franklin v. United States Postal Serv., 81 M.S.P.R. 294, 296 (1999).

C. Cases.

1. Bad Faith - Miller v. Dep't of Health and Human Services, EEOC Appeal No. 05970174 (August 26, 1998). EEOC set aside SA finding that the agency acted in bad faith by not executing SA until two months after complainant had signed agreement.
2. Coercion.
 - a. Anderson v. Environmental Protection Agency, 81 M.S.P.R. 618 (1999). Appellant failed to present evidence that she involuntarily accepted the other party's terms, that circumstances permitted no other alternative, or that the circumstances resulted from the AJ's coercive acts.

- b. Brown v. Dep't of Agriculture, EEOC Appeal No. 05960769 (July 16, 1999). In determining whether a release was knowing and voluntary, the EEOC will look to the totality of circumstances. Factors to be considered include complainant's education and experience; amount of time to consider agreement before signing; clarity of agreement; opportunity to consult with an attorney; employer's encouragement or discouragement of consultation with an attorney; and consideration given in exchange for the waiver.
3. Diminished capacity - Kocher-Kinsman v. Dep't of Agriculture, EEOC Appeal No. 01992748 (January 18, 2000). EEOC voids SA finding that complainant had diminished capacity based on unrefuted medical evidence that she suffered from significant anxiety symptoms. The Agency argued that complainant voluntarily entered into the SA, noting that she had been consulting with an attorney and the SA contained a provision for payment of fees.

D. Remedies.

1. Rescission and reinstatement - 5 CFR §1614.504(c). If the EEOC determines that the agency is not in compliance with the terms of a SA and the noncompliance is not attributable to acts or conduct of the complainant, it may order compliance or it may order that the complaint be reinstated for further processing from the point processing ceased. The decision regarding whether to order compliance with the SA or reinstatement of the complaint is discretionary and based on the factual circumstances presented in each case. Any allegations that raise subsequent acts of discrimination as violations of a SA should be processed as a separate complaint, rather than as allegations of breach of the SA. *See, e.g., Nash v. USPS*, EEOC Appeal No. 01996251 (March 14, 2002) (ordering complaint be reinstated for agency failure to comply with SA's overtime commitment; claim of reprisal must be raised in separate complaint).
2. Enforcement.
 - a. Wisdom v. Dep't of Defense, 78 M.S.P.R. 652 (1998). Appellant's status as a former employee does not deprive the Board of authority to order him to comply with the SA.
 - b. Day v. Dep't of Air Force, 78 M.S.P.R. 364 (1998). When an agency breaches an agreement, the employee normally has the option of enforcing the agreement or rescinding it and reinstating the appeal if the provision breached was a "principal term" or "material to the agreement."

- c. Foreman v. Dep't of the Army, 241 F.3d 1349 (Fed. Cir. 2001). A settlement can not impose obligations on a third party without its consent; such a term is excusable on the ground of impossibility and can be severed from the remaining terms of the agreement.

- 3. Attorney Fees, Interest, Costs.
 - a. Epstein v. Dep't of Health and Human Services, EEOC Appeal No. 05970671 (July 2, 1998). Agency refusal to comply with terms read into the record constituted bad faith dealing, justifying an award of attorney's fees as a sanction.
 - b. Damario v. USPS, EEOC Appeal No. 01983665 (June 15, 1999). SA provided that agency would pay complainant \$40K in compensatory damages NLT 14 days after execution. Agency found in breach and required to pay interest for making payment 97 days late.
 - c. Velasquez v. Dep't of Justice, EEOC Appeal No. 04960018 (February 2, 1997). Agency failure to complete the investigation or issue its decision within the timeframes ordered by the EEOC constitutes noncompliance, thereby entitling complainant to attorney's fees and costs in processing the petition for enforcement.
 - d. Terrell v. Dep't of Health and Human Services, EEOC Appeal No. 04950018 (November 7, 1996). Agency failure to complete supplemental investigation in timely manner allows complainant to request that the AJ shift discovery costs to the agency.

- 4. Compensatory and Other Damages in Enforcement and Compliance Proceedings.
 - a. Compensatory damages are not available for allegations of breach, since such allegations do not involve a determination of whether discrimination has occurred. Gibbons v. U.S. Postal Service, EEOC Appeal No. 01952319 (December 14, 1995); Berendsen v. Dep't of Agriculture, EEOC Appeal No. 05950488 (March 1, 1996).
 - b. EEOC's regulations do not provide for sanctions for breach of SA. In Jenkins v. Dep't of Agriculture, EEOC Appeal No. 01960794 (December 11, 1996), the EEOC stated that it lacked authority to order the agency to pay complainant the entire amount of his compensatory damage claim as a sanction for the agency's delay. The complainant may only seek an order for specific enforcement of the SA or reinstatement of his complaint.

- c. The MSPB likewise has no authority to pay damages for breach or order amendment of the terms of the agreement. Foreman v. Dep't of the Army, 241 F.3d 1349 (Fed. Cir. 2001).

VIII. ARMY SETTLEMENT POLICY (EEO)—AR 690-600.

- A. Compensatory Damages. Activity or installation commanders possess authority to settle compensatory damage claims up to the maximum amount authorized by law, subject to certain conditions and any limits set by the appropriate Major Commands.
- B. Reporting Requirement. Whenever an activity agrees to pay compensatory damages in settlement of an EEO complaint, the activity labor counselor must forward a copy of the signed SA to the Chief, Labor and Employment Law Division, Office of The Judge Advocate General. The labor counselor also must provide the following information about the settlement:
 1. The total amount of compensatory damages the activity paid.
 2. The amount of pecuniary compensatory damages the activity will pay.
 3. The amount of nonpecuniary compensatory damages the activity will pay.

NOTE: The reporting requirements apply to any payment of compensatory damages by settlement, even if the payment of compensatory damages is not specifically stated in the settlement agreement but was considered as a component of a lump sum payment.

- C. Attorney's Fees. Although there are no dollar limits on payment of attorney's fees claims in settlements, the regulation specifies the kinds of evidence needed to substantiate a fee claim.

IX. PRACTICAL TIPS.

- A. Comply with Older Workers Benefit Protection Act (OWBPA) - 29 U.S.C. § 621, *et seq.*
 1. 29 CFR § 1625.22 - Waiver of rights and claims under the ADEA *does not apply*. Kiwan v. Caldera, EEOC Appeal No. 01996318 (January 21, 2001). The minimum requirements for determining if a waiver is knowing and voluntary in *settlement* of an EEO complaint are:
 - a. Understandable to complainant.
 - b. Agreement in writing.
 - c. Refers to rights or claims under the ADEA.
 - d. No waiver of future rights.

- e. Valuable consideration.
- f. Complainant advised in writing to consult with attorney.
- g. Reasonable time to consider.

NOTE: The Statutory provisions for waiver of a right or claim under 29 U.S.C. § 626(f)(1) are different than the rights listed above for Settlement of an EEO complaint under § 626(f)(2) (21 day to consider, 7 days to cancel do not apply to settlement of EEO complaints).

2. Cases.

- a. Farley v. Dep't of the Navy, EEOC Appeal No. 01A06004 (July 17, 2001). A waiver of rights under the OWBPA is knowing and voluntary only if it specifically references the OWBPA and contains all terms listed in 29 U.S.C. § 626(f)(2).
- b. Oubre v. Entergy Operations, Inc., 522 U.S. 422 (1998). The Court held that the employee's waiver or release of her ADEA claims was unenforceable because the release did not comply with the OWBPA requirements; the employee's retention of the severance payment did not amount to a ratification of the release. Tendering back the severance payment was not a precondition to filing suit as to the ADEA claim. The employer cannot invoke the employee's failure to tender back as a way of excusing its own failure to comply with the OWBPA.
- c. Woychik-Brown v. Dep't of Agriculture, EEOC Appeal No. 05960768 (July 16, 1999). At least one of appellant's formal or informal complaints referenced in the SA was based on age, therefore SA subject to OWBPA waiver standards. Harris v. Dep't of the Air Force, 98 M.S.P.R. 261 (March 9, 2005): "settlement agreement was ineffective only insofar as it constitutes a waiver of any claim that the agency's removal action constituted discrimination based on age."
- d. Della-Volle v. Dep't of the Navy, EEOC Appeal No. 0197674 (December 15, 1998). Formal complaint based on complainant's failure to be rated or referred for a position. A "no cost" SA invalid for failure to comply with OWBPA.

B. Don't Make Promises Regarding Tax Consequences.

1. Small Business Job Protection Act (1996) - Revised § 104(a) of the Internal Revenue Code (26 U.S.C.) to clarify that damages received for personal physical injuries or physical sickness are excluded from taxable gross income; however, emotional distress shall not be treated as a physical injury or physical sickness. Exception - damages paid for medical care attributable to emotional distress not in excess of the amount paid for medical care.
 2. DFAS must make the appropriate deductions and withholdings. Include a provision in SA that states back pay awards are subject to normal federal and state income tax, FICA, and other withholdings as specified by law and regulation; also state that the parties agree the employee is solely liable for all tax consequences and obligations arising from the payment.
 3. Crosby v. U.S. Postal Serv., 85 M.S.P.R. 26 (December 22, 1999), *aff'd*, 243 F.3d 560 (Fed. Cir. 2000) (Unreported decision can be accessed at 2000 U.S. App. LEXIS 23366). Agency did not breach SA when it withheld taxes, social security, and Medicare contributions from payment under SA that stated agency would make “standard deductions.”
- C. Coordinate. All leaders are best served by coordinated agreement between CPOC, CPAC, EEO and management officials - all bring a different perspective; coordinate laterally and vertically, when appropriate.
- D. Avoid Confidentiality Clauses. DOJ policy prohibits entering into settlement agreements that contain confidentiality provisions. 28 C.F.R. § 50.23(a).
1. Consunji v. Dep’t of the Navy, EEOC Appeal No. 01A02199 (March 14, 2002). Agency found in breach for disclosing that it had fired the complainant in OPM suitability inquiry; violated confidentiality provision in settlement agreement.
 2. Bradford v. Dep’t of Defense, EEOC Appeal No. 01964248 (March 31, 1997). SA, submitted as an offer of full relief, is invalid because it contained a provision requiring complainant to keep the terms of the offer confidential except in certain limited circumstances.
 3. Riek v. Dep’t of Veterans Affairs, EEOC Appeal No. 01992976 (December 11, 2001). Providing copy of SA with confidentiality clause to AUSA to defend against suit filed in federal court did not violate SA.

4. Powell v. Dep't of Commerce, 98 M.S.P.R. 398 (March 31, 2005). Agency breached confidentiality provision of the parties' settlement agreement with respect to employment-related inquiries. Agency argued no adverse effect on appellant; therefore, not a material breach. Board found breach material when it relates to a matter of vital importance, or goes to the essence of the contract. Promises of non disclosure provide a major benefit to the employees who agree to withdraw appeals. Such a breach can not be cured; order of enforcement not possible. Reinstatement ordered.
- E. Beware of Future Promises.
1. Examples: Agency will provide prospective employers only favorable information; agency will not provide future employers derogatory information; all inquiries concerning appellant's or complaint's employment will be directed to....
 2. Easy to breach and sets the agency up for failure. Only make promises that you can keep and that are easy to keep.
- F. Ensure a Meeting of the Minds.
1. Clear concise language. A SA is a contract and subject to ordinary principles of contract interpretation. In interpreting a SA, the EEOC has applied the contract principle known as the "plain meaning rule," which holds that where a writing is unambiguous on its face, its meaning is determined from the four corners of the instrument without resort to extrinsic evidence.
 2. Anticipate future disputes and address them in the SA.
- G. Fix the Problem.
1. Agreement should fix the problem, not just resolve the complaint.
 2. Settlement should heal the rift in the relationship.
 3. Although not part of SA, if agency officials settle case because of actual discrimination, activity should seriously consider disciplinary action.
- H. Seek Global Agreements.
1. Consolidate all outstanding complaints.

2. Consolidate disputes in other forums (appeals, complaints, grievances) and against other activities. Dunn v. Dep't of Army, 100 M.S.P.R. 89 (August 31, 2005). Global settlement agreement of discrimination lawsuit in Federal court and MSPB appeal for the 1998 improper removal of appellant from Federal service. Agreement not submitted to Board for review and approval, the Board did not retain jurisdiction for enforcement. The settlement agreement set forth, in relevant part, that “[the] parties acknowledge that this Settlement Agreement fully and completely resolves all disputes and claims between them, whether known, or unknown, administrative or judicial, accruing on or before the date of this document.”

I. Creativity.

1. Look for win-win solutions.
2. Consider last chance agreements if rehabilitation possible.
3. Use interest based bargaining - what are the parties underlying interests?
4. Be open to possibilities and opportunities for resolution that satisfy everyone's interests.
5. Include other headaches in SA, *e.g.*, withdrawal of all FOIA requests pending anywhere in agency.

J. Execution.

1. Duplicate Originals (OK) — Signed as Ceremony? (NO)
2. Get management to buy-in by signing agreement.
3. Follow-up to ensure compliance.

X. CONCLUSION.

CHAPTER M

**Civilian Whistleblower Complaints and
Prohibited Personnel Practices**

TABLE OF CONTENTS

I. REFERENCES2

II. OVERVIEW2

III. OFFICE OF SPECIAL COUNSEL3

IV. PROHIBITED PERSONNEL PRACTICES.3

V. PROCESSING CLAIMS OF PPPS.....6

VI. CONCLUSION.....15

Administrative and Civil Law Department
The Judge Advocate General’s Legal Center and School

Civilian Whistleblower Complaints and Prohibited Personnel Practices

I. REFERENCES.

- A. Title 5, United States Code, § § 2302, 1211-1219 (Whistleblower Protection Act of 1989, as amended by the Whistleblower Protection Enhancement Act of 2012, Pub. L. 112-199).
- B. Civil Service Reform Act of 1978, found in scattered sections of Title 5, United States Code and codified as amended at 5 U.S.C. § § 1101-8913.
- C. Office of Special Counsel Reauthorization Act, 108 Stat 4361 (1994). Made management responsible for informing employees of rights, especially whistleblower.
- D. 5 U.S.C. Chapter 12, subchapters II and III (Office of Special Counsel and Individual Right of Action in Certain Reprisal Cases).
- E. 5 U.S.C. Chapter 23 (Merit System Principles and Prohibited Personnel Practices).
- F. 5 C.F.R. Part 1201, Subpart D (MSPB Practices and Procedures for Special Counsel Actions).
- G. 5 C.F.R. Part 1209 (Practices and Procedures for Appeals and Stay Requests of Personnel Actions Allegedly Based on Whistleblowing).
- H. 5 C.F.R. Part 1800 (OSC Implementation of the Whistleblower Protection Act).
- I. 32 C.F.R. Part 145 (DOD Cooperation with OSC).
- J. 5 C.F.R. Part 772 (Interim Relief).

II. OVERVIEW.

- A. The Whistleblower Protection Act (WPA), as amended, prohibits agencies from taking adverse personnel actions against employees and applicants for employment because they have engaged in whistleblowing activities.
- B. Protected Whistleblowing. An employee or applicant for employment is entitled to whistleblower protection from retaliation if he or she makes a “protected disclosure,” i.e., “any disclosure of information . . . which the employee or applicant reasonably believes evidences any violation of law, rule, or regulation, or gross mismanagement, a gross waste of funds; an abuse of authority, or a

substantial and specific danger to public health or safety.” 5 U.S.C. 2302(b)(8)(A); *Ingram v. Department of the Army*, 111 LRP 50372, 116 MSPR 525 (MSPB 2011).

- C. The WPA does not apply to disclosures of information that is “specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs.” 5 U.S.C. § 2302 (b)(8).
- D. The Whistleblower Protection Act (WPA) is predicated on the congressional determination that whistleblowers "serve the public interest by helping to eliminate fraud, waste, abuse, and unnecessary government expenditures. . . [P]rotecting whistleblowers leads to a more effective civil service." *Marren v. Dep't of Justice*, 51 M.S.P.R. 632 (1991).
- E. The WPA sends "a strong, clear signal to whistleblowers that Congress intends that they be protected from retaliation related to their whistleblowing." *Marano v. Dep't of Justice*, 3 F.3d 1137 (Fed. Cir. 1993).
- F. The WPA was amended by the Whistleblower Protection Enhancement Act (WPEA) of 2012, P.L. 112-199. This Act provides whistleblowers additional protection from retaliation for reporting government fraud, waste, or abuse. It also clarifies what constitutes a protected disclosure, and requires a statement in non-disclosure policies, forms, and agreements that they are consistent with certain disclosure protections.

III. OFFICE OF SPECIAL COUNSEL. 5 U.S.C. § 1211-19; 5 C.F.R. PART 1800.

- A. Originally the “prosecutorial arm” of the Merit Systems Protection Board (MSPB).
- B. Now independent offshoot of MSPB. Authorized to:
 - 1. Investigate prohibited personnel practices and other activities prohibited by civil service law, rule, or regulation.
 - 2. Seek corrective action on behalf of individuals who are victims of prohibited personnel practices.
 - 3. Seek disciplinary action against agency officials who commit prohibited personnel practices.
 - 4. Advise on and enforce Hatch Act provisions on political activity applicable to federal, state, and local government employees.

IV. PROHIBITED PERSONNEL PRACTICES. 5 U.S.C. § 2302.

- A. Statutory Prerequisites. Four elements: a covered agency, covered position, covered personnel action, and commission of a prohibited personnel practice (PPP).
1. Covered Agencies. 5 U.S.C. § 2302(a)(2)(C). Most executive branch agencies and the Government Printing Office, but not—
 - a. The Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the Central Imagery Office, the National Security Agency, and, as determined by the President, any Executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities; or
 - b. the General Accounting Office; and
 - c. most government corporations except in the case of an alleged prohibited personnel practice described under 5 U.S.C. § 2302(b)(8).
 2. Covered Positions. 5 U.S.C. § 2302(a)(2)(B). Employees and, in some cases, applicants in the competitive service; career senior executive service (SES); most excepted service (except schedule C policy or confidential positions).
 - a. Nonappropriated Funds (NAF) employees. See *Clark v. Army and Air Force Exchange Service*, 57 M.S.P.R. 43 (1993) (holding that a NAF employee is not covered by prohibited personnel practice protections, including whistleblower coverage).
 - b. NAF Employees. NAF employees are protected from whistleblower-type reprisal by a separate statute, 10 U.S.C. § 1587, as implemented by DODD 1401.3 (23 Apr 08). NAF employees have the right and are encouraged to submit complaints of fraud, waste, mismanagement, and reprisal to the DOD IG.
 3. Covered Personnel Actions. 5 U.S.C. § 2302(a); 5 C.F.R. § 1209.4(a). Most actions will be considered “covered.” Examples: an appointment; a promotion; a disciplinary or corrective action; a detail, transfer, or reassignment; a reinstatement; a restoration; a reemployment; a performance evaluation; a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, or performance evaluation; a decision to order psychiatric testing or examination; and any other significant change in duties, responsibilities,

or working conditions. Example of action not covered: Letter of Counseling.

4. Prohibited Personnel Practice. Taken by employee with requisite personnel authority. 5 U.S.C. § 2302 (b). Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not:
 - a. Discriminate. Although discrimination is a PPP, Office of Special Counsel (OSC) defers the following discrimination allegations to agency and EEOC complaint processes: race, color, religion, sex, national origin, age, and disability. 5 U.S.C. § 2302(b)(1).
 - b. Solicit or improperly consider improper employment recommendations or statements. 5 U.S.C. § 2302(b)(2). Example: Selecting official hires applicant based on recommendation of Senator Smith, who knows nothing about applicant's qualifications for job.
 - c. Coerce political activity or take reprisal for refusal to engage in political activity. 5 U.S.C. § 2302(b)(3).
 - d. Deceive or willfully obstruct anyone from competing for employment. 5 U.S.C. § 2302(b)(4).
 - e. Influence a withdrawal from competition in order to improve or injure employment prospects of another. 5 U.S.C. § 2302(b)(5).
 - f. Grant unlawful preference or advantage in order to improve employment prospects. 5 U.S.C. § 2302(b)(6). Common misconception: Unauthorized preference is more than a preconceived idea that one person may be the best selectee for a particular position ("preselection"). It requires the granting of some illegal advantage and an intentional manipulation of the system to insure that one person is favored and another person is disadvantaged. It is not unlawful for management to select the candidate it had in mind at the time a vacancy announcement was posted, so long as the selection followed an open competition and is otherwise justifiable.
 - g. Improperly employ relatives (nepotism). 5 U.S.C. § 2302(b)(7).
 - h. Retaliate against whistleblowers. As discussed below, many of the provisions of the Whistleblower Protection Act of 1989 (WPA) apply only to allegations of reprisal for whistleblowing. 5 U.S.C. § 2302(b)(8).
 - i. Take other forms of retaliation. 5 U.S.C. § 2302(b)(9). Taking or

failing to take personnel action for exercise of appeal, complaint, or grievance right; for testimony or assistance to person exercising such rights; for cooperation with OSC or IG; for refusal to obey unlawful order.

- j. Discriminate based on conduct not adverse to job performance (except suitability determinations). 5 U.S.C. § 2302(b)(10). Example: Supervisor does not drink alcohol and disapproves of employee's partying on weekends (so long as employee's work performance not impaired by the drinking). Other example: homosexuality.
- k. Take or fail to take personnel action in violation of Veterans Preference requirement. 5 U.S.C. § 2302(b)(11).
- l. Violate merit principles (codified at 5 U.S.C. § 2301). 5 U.S.C. § 2302(b)(12). *Special Counsel v. Brown*, 61 M.S.P.R. 559 (1994). Example: probationary employee fired because of letter he wrote to editor (violates his 1st amendment rights).
- m. Implement or enforce any nondisclosure policy, form, or agreement, if they do not contain a written statement of adherence to certain disclosure protections, as set forth in 5 U.S.C. § 2302(b)(13).

V. PROCESSING CLAIMS OF PROHIBITED PERSONNEL PRACTICES.

A. Office of Special Counsel. 5 U.S.C. §§ 1212-1215.

- 1. The OSC investigation--applies to all PPPs.
 - a. Statutory requirement: Upon receipt of an allegation of any of the 12 prohibited personnel practices, the OSC must investigate to the extent necessary to determine whether reasonable grounds exist to believe a prohibited personnel practice has or will occur.
 - b. Procedures.
 - (1) Notification of receipt of allegation.
 - (2) Periodic status notification.
 - (3) Notification of termination of investigation. OSC first screens each case to determine whether to refer for full field investigation or to close (due to lack of jurisdiction or evidence). Complainant has opportunity to respond to OSC's notice of termination.
 - c. Nondisclosure of identity of complainant. 5 U.S.C. § 1212(g)(1).

2. Personnel Action - Stays. 5 U.S.C. § 1214(b)(1); 5 C.F.R. § 1201.127.
 - a. Purpose. The stay provisions are intended to preserve (or restore) the status quo while:
 - (1) The OSC completes its investigation of the alleged prohibited personnel practice;
 - (2) The MSPB considers the OSC's request for corrective or disciplinary action.
 - b. Procedures. OSC seeks “stays” of personnel actions by:
 - (1) Negotiation with agency.
 - (2) Petition to MSPB (Board member can grant stay for up to 45 days). MSPB may extend stay after agency comment. *Special Counsel v. Dep’t of Air Force*, 56 M.S.P.R. 365 (1993).
 - (3) The OSC may initiate termination of stay. *Special Counsel v. Fed. Aviation Auth.*, 60 M.S.P.R. 19 (1993).
3. Corrective Actions. 5 U.S.C. § 1214(g), § 1221(g)(1)(A). See *Prior v. Dep’t of Air Force*, 56 M.S.P.R. 561 (1993); *Special Counsel v. Dep’t of the Army*, 16 M.S.P.R. 178 (1983).
 - a. This is the OSC remedy for most PPP’s, including whistleblower retaliation. Examples: job restoration, back pay.
 - b. The OSC report and recommendations for corrective action.
 - c. Negotiate voluntary compliance by agency.
 - d. File petition for corrective action to MSPB.
 - e. Standard of Proof--preponderance of evidence.
4. Elements of Proof in Whistleblower Retaliation case. 5 U.S.C. § 1214(b)(4); 5 U.S. C. § 1221(e). Protected disclosure of information; personnel action taken, not taken, or threatened; actual or constructive knowledge of the protected disclosure; and protected disclosure was a “contributing factor” in the personnel action.
 - a. Protected Disclosure (Element 1). *Sirgo v. Dep’t of Justice*, 66 M.S.P.R. 261 (1995).

- (i) Any disclosure of information that reasonably evidences a violation of any law, rule, or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if the disclosure is not specifically prohibited by law and if the information is not specifically required to be kept secret; or
 - (ii) Any disclosure to the OSC, or to the agency IG or another employee designated to receive such disclosures, of information that reasonably evidences a violation of any law, rule, or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.
 - (iii) Reasonable belief. “The proper test for determining whether an employee had a reasonable belief that his disclosures were protected is whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee could reasonably conclude that the actions evidenced a violation of a law, rule, or regulation, or one of the other conditions set forth in 5 U.S.C. § 2302(b)(8).” *Ormond v. Department of Justice*, 112 LRP 37380, 118 MSPR 337, 2012 WL 2924126 (M.S.P.B. July 18, 2012).
 - (iv) Disclosing suspected time card fraud is whistleblowing. *D’Elia v. Dep’t of Treasury*, 65 M.S.P.R. 540 (1994).
 - (v) Disclosure need not be accurate to be protected, so long as employee had reasonable belief that it is true (test is both objective and subjective). Whistleblower need not be the first to disclose the information.
- b. WPEA clarifies when disclosures of information constitute protected whistleblowing. 5 U.S.C. § 2302(f)(1) and (2). Specifically, the Act states that a disclosure is not unprotected because:
- (i) The disclosure was made to a supervisor or to a person who participated in an activity that the employee or applicant reasonably believed to be covered by subsection 5 USC 2302 (b)(8)(A)(i) and (ii). Supersedes *Horton v. Navy*, 66 F.3d 279 (Fed. Cir. 1995).
 - (ii) The disclosure revealed information that had been previously disclosed. Supersedes *Meuwissen v. Dept. of Interior*, 234 F.3d 9 (Fed. Cir. 2000).

- (iii) Of the employee's or applicant's motive for making the disclosure. Codifies rule in *Fickie v. Army*, 86 MSPR 525, 530 (2000).
- (iv) The disclosure was not made in writing.
- (v) The disclosure was made while the employee was off duty.
- (vi) Of the amount of time that has passed since the occurrence of the events described in the disclosure. 5 USC 2302 (f)(1).
- (vii) The disclosure was made in the normal course of the employee's duties. Supersedes *Willis v. Dept. of Agriculture*, 141 F.3d 1139 (Fed. Cir. 1998). For example, a financial auditor who reports a violation of law or regulation has made a protected disclosure even if the employee has a duty to report such information.

c. Not a Protected Disclosure.

- (i) Filing an EEO complaint does not constitute protected whistleblowing activity under the WPA. *Spruill v. MSPB*, 978 F.2d 679 (Fed. Cir. 1992); *Doster v. Dep't of Army*, 56 M.S.P.R. 251 (1993).
- (ii) Filing a grievance and other actions in support of employee union do not constitute whistleblowing under § 2302(b)(8). *Wooten v. Dep't of Health and Human Services*, 54 M.S.P.R. 143 (1992); *Fisher v. Dep't of Defense*, 47 M.S.P.R. 585 (1991).
- (iii) An earlier MSPB appeal is not whistleblowing. *Metzenbaum v. Dep't of Justice*, 54 M.S.P.R. 32 (1992); *Ruffin v. Dep't of Army*, 48 M.S.P.R. 74 (1991).
- (iv) Filing an unfair labor practice complaint does not constitute protected whistleblowing under the WPA. *Coffer v. Dep't of Navy*, 50 M.S.P.R. 54 (1991).
- (v) Assignment of an employee to a different supervisor without a change of position is not a personnel action. *Wagner v. Environmental Protection Agency*, 51 M.S.P.R. 337 (1991), *aff'd by Wagner v. Environmental Protection Agency*, 972 F.2d 1355 (Fed. Cir. 1992).
- (vi) Employee's allegation that he was denied training for a period of two years failed to show a "personnel action" within meaning of WPA. For denial of training to be a

personnel action within WPA there must be, at minimum, moderate probability that training would have resulted in some type of personnel action such as appointment, promotion, performance evaluation, or other covered action. *Shivaee v. Dep't of Navy*, 74 M.S.P.R. 383 (1997).

- (vii) Employee's exclusion from a conference did not constitute a personnel action. *Wagner v. Environmental Protection Agency*, 51 M.S.P.R. 326 (1991).
 - (viii) Management's request for audit of employee's pay records is not a personnel action. *Marren v. Dep't of Justice*, 50 M.S.P.R. 474 (1991).
- d. A Personnel Action (Element 2). "[T]ake or fail to take, or threaten to take or fail to take, a personnel action . . ."
- (i) Proposing the removal of a probationary employee is a threatened personnel action under the WPA. *Sirgo v. Dep't of Justice*, 66 M.S.P.R. 261 (1995).
 - (ii) Failure to renew or extend a temporary appointment constitutes a personnel action. *Kern v. Dep't of Agriculture*, 48 M.S.P.R. 137 (1991).
 - (iii) Denial of annual leave is a personnel action. *Marren v. Dep't of Justice*, 50 M.S.P.R. 369 (1991), *aff'd*, 980 F.2d 745 (Fed. Cir. 1992).
 - (iv) Reductions in force and qualification determinations may be personnel actions. *Carter v. Dep't of Army*, 56 M.S.P.R. 321 (1993), *reversed*, 62 M.S.P.R. 393 (1994) (holding that a reduction-in-force action, taken for reasons which are personal to an employee, is a personnel action within the meaning of 5 U.S.C. § 2302(a)(2)(A) and that an agency's failure to waive qualification requirements is also a personnel action within the meaning of that provision).
 - (v) Order to undergo a fitness for duty exam is a personnel action. 5 U.S.C. § 2302(a)(2)(A)(x).
 - (vi) Placing an employee on "administrative leave" constitutes a personnel action. *Special Counsel v. Internal Revenue Serv.*, 65 M.S.P.R. 146 (1994).
- e. Actual or Constructive Knowledge of Protected Disclosure (Element 3).

- (i) In reaching that determination, the acting official's knowledge of the disclosure and the timing of the personnel action constitute circumstantial evidence for consideration. *Kinan v. Dep't of Defense*, 87 M.S.P.R. 561 (2001).
 - (ii) An employee can also demonstrate reprisal by establishing the official taking the action had constructive knowledge of the protected activity. *Marchese v. Dep't of Navy*, 65 M.S.P.R. 104 (1994); *McClellan v. Dep't of Defense*, 53 M.S.P.R. 139 (1992).
- f. The protected disclosure was a "contributing factor" in the decision to take the personnel action (Element 4).
 - (i) As long as a protected disclosure played any part in retaliation, it is a contributing factor. 5 U.S.C. § 121(e)(1)(A), (B).
 - (ii) *Horton v. Dep't of Navy*, 66 F.3d 279 (Fed.Cir.1995). Circumstantial evidence of knowledge of protected disclosure and reasonable relationship between time of protected disclosure and time of personnel action will establish, prima facie, that disclosure was contributing factor to personnel action for purposes of Whistleblower Protection Act (WPA). See 5 U.S.C.A. § 1221(e)(1); see also *Kewley v. Dep't of Health and Human Servs.*, 153 F.3d 1357 (C.A.Fed., 1998).
- 5. Agency Defense. The agency must then show by "clear and convincing" evidence that it would have taken the same action even if there had been no protected disclosure. 5 U.S.C. § 1221(e)(2); *Dean v. Dep't of Army*, 59 M.S.P.R. 296 (1993) (an agency official need not change a planned personnel action after becoming aware of a protected disclosure--evidence of preplanning constitutes clear and convincing evidence).
- 6. OSC disciplinary actions against management. 5 U.S.C. § 1215.
 - a. Standard of Proof. The OSC must prove charges by a preponderance of the evidence. *Special Counsel v. Eidmann*, 49 M.S.P.R. 614 (1991), aff'd, 976 F.2d 1400 (Fed. Cir. 1992).
 - b. No jurisdiction over military personnel.
 - c. Whether the basis for disciplinary action involves reprisal for whistleblowing under the WPA or under the CSRA, the evidentiary standard used to determine whistleblowing violations

is proof that the employee's whistleblowing was a "significant factor" or "motivating factor" in the personnel action. *Eidmann v. MSPB*, 976 F.2d 1400 (Fed. Cir. 1992); *Special Counsel v. Santella*, 65 M.S.P.R. 452 (1994).

7. Procedures. 5 U.S.C. § 1215; 5 C.F.R. §§ 1201.121-129. OSC files complaint with MSPB, charging employee with commission of PPP.
 - a. Right to file answer. 35 days. 5 C.F.R. § 1201.124.
 - b. Representation by attorney or other representative.
 - c. Hearing before administrative judge (AJ).
 - (a) AJ issues recommended decision.
 - (b) Right to file exceptions to recommended decision.
 - d. Final written decision by Board.
8. Penalty. 5 C.F.R. § 1201.126.
 - a. Possible disciplinary actions include: removal; reduction in grade; debarment from federal employment for up to 5 years; suspension; reprimand; or a civil penalty up to \$1,100. Penalties are imposed alternatively and not collectively. *Special Counsel v. Doyle, McDonald, Endsley, Floersheim, and Betten*, 45 M.S.P.R. 43 (1990).
 - b. Douglas factors applicable in determining appropriate penalty. *Special Counsel v. Hoban*, 24 M.S.P.R. 154 (1984).
 - c. Flexibility in imposing penalty.
9. Judicial Review. 5 C.F.R. § 1201.127. Appealable as a final MSPB decision to Court of Appeals for Federal Circuit. 5 U.S.C. §§ 1215(a)(4), 7703(b).

B. Employee Actions.

1. MSPB Jurisdiction in Individual Right of Action (IRA) Whistleblowing Cases. 5 U.S.C. § 1221; 5 C.F.R. Part 1209. *Spencer v. Dep't. of Navy*, 327 F.3d 1354 (Fed. Cir. 2003). Limited to non-frivolous claims of whistleblower retaliation.
 - a. The employee engaged in protected whistleblowing activity.
 - b. The agency took, failed to take, or threatened to take (or fail

- to take) a personnel action covered by 5 U.S.C. § 2302(b)(8).
- c. The employee exhausted process before the OSC (filed PPP complaint). *Lozada v. EEOC*, 45 M.S.P.R. 310 (1990). See also *Knollenberg v. Merit Systems Protection Bd.*, 953 F.2d 623, 626 (Fed. Cir. 1992) (employee has not exhausted the OSC remedy when employee fails to provide the OSC with sufficient information to pursue an investigation which might lead to corrective action).
 - d. Constructive Exhaustion. Employee will be deemed to have exhausted the OSC remedies when the OSC investigation is not completed in 120 days from the filing of the complaint.
 - e. IRA must be filed within 65 days of notification of termination of investigation by the OSC. *Pry v. Dep't of Navy*, 59 M.S.P.R. 440 (1993).
 - f. An employee invoking the IRA jurisdiction of the Board must assert essentially the same facts asserted in the complaint to the OSC to satisfy the exhaustion requirement. *Ward v. MSPB*, 981 F.2d 521 (Fed. Cir. 1992).
 - g. In an IRA, the MSPB will not deem relevant the OSC's termination of investigation.
 - h. The MSPB has no authority to review discrimination claims raised in an individual right of action appeal. *Marren v. Dep't of Justice*, 51 M.S.P.R. 632 (1991), aff'd, 980 F.2d 745 (Fed Cir. 1992).
2. Raising "True" or Appealable actions with the OSC. Claims of PPP's, including reprisal for whistleblowing, may be raised as affirmative defenses in an otherwise appealable action. 5 U.S.C. § 7701(c)(2)(B). *Gallegos v. Dep't of Interior*, 60 M.S.P.R. 5 (1993).
 3. Employee "Stay" Requests. 5 U.S.C. §§ 1221(c)(1) and 1221(I). Basis for granting: substantial likelihood that employee can demonstrate that whistleblowing was a contributing factor in a personnel action (taken, proposed, or threatened).
 - a. Procedures. 5 C.F.R. Part 1209, Subpart C.
 - b. Exhaustion of the OSC remedy, unless otherwise appealable action.
 - c. Stay request filed with MSPB regional offices. Employee has burden to establish jurisdiction and appropriateness of

stay. 5 C.F.R. § 1209.9(a).

- d. Agency must be given an opportunity to respond to appellant employee's request.
 - e. Hearing and order on stay request.
 - f. Length of Stay. A stay of the termination of an employee during his probationary period serves to maintain the probationary period for the duration of the stay. *Special Counsel v. Dep't of Veterans Affairs*, 45 M.S.P.R. 486 (1990).
 - g. Stay decisions are reviewable by interlocutory appeal. *Weber v. Dep't of Army*, 47 M.S.P.R. 130 (1991).
4. Employee Corrective Actions. 5 U.S.C. § § 1214(a)(3), 1221.
- a. Basis for relief:
 - (1) A protected disclosure under 5 U.S.C. § 2302(b)(8) ("whistleblowing").
 - (2) The whistleblowing was a contributing factor in a personnel action as defined in 5 U.S.C. § 2302(a)(2) and 5 C.F.R. § 1209.4(a); *Marano v. Dep't of Justice*, 2 F.3d 1137 (Fed. Cir. 1993).
 - b. Burdens of Proof in IRA cases. Employee must show that whistleblowing was a contributing factor in the personnel action, and then the agency can attempt to show by clear and convincing evidence that it would have taken the same action even if there had been no protected disclosure. See 5 U.S.C. § 1221(i); *Hebert v. Dep't of Navy*, 57 M.S.P.R. 68 (1993).
 - c. Relief.
 - (1) "Such corrective action as the Board considers appropriate."
 - (2) "Make whole" remedy. Attorney's fees, back pay and related benefits, medical costs incurred, travel expenses, and any other reasonable and foreseeable consequential damages. *Bonggat v. Dep't of Navy*, 56 M.S.P.R. 402 (1993). Remedy does not include restoration of annual leave for employee who prosecuted his case *pro se* and used the annual leave to prepare his case to the Board. *Reams v. Dep't of Treasury*, 91 M.S.P.R. 447 (2002).

5. Judicial Review--U.S. Court of Appeals for the Federal Circuit. 5 U.S.C. § § 1221(h)(2), 7703(b).
- C. Election of Remedies. Employees covered by collective bargaining agreement must choose between remedies for PPPs. Options are negotiated grievance procedure, OSC complaint, or MSPB appeal. 5 U.S.C. § 7121(g).

VI. CONCLUSION.

CHAPTER N

Reductions in Force and Transfers

TABLE OF CONTENTS

I. INTRODUCTION.....	2
II. REFERENCES	2
III. ACTIONS TO ACCOMPLISH PERSONNEL REDUCTIONS	3
IV. REDUCTION IN FORCE (RIF).....	3
V. TRANSFER OF FUNCTION (TOF).....	15
VI. DISPLACED EMPLOYEE BENEFITS	16
VII. LABOR MANAGEMENT ISSUES.....	15
VII. CONCLUSION.....	18
RIF TABLE 1.....	19
RIF TABLE 2.....	20
RIF TABLE 3.....	21

Administrative and Civil Law Department
The Judge Advocate General's Legal Center and School

Reductions in Force and Transfers

I. INTRODUCTION.

II. REFERENCES.

- A. 5 U.S.C. §§ 3501-3504 (reduction in force and transfer of function).
- B. 5 C.F.R. Part 351, Reduction in Force.
- C. 5 C.F.R. Part 550, Subpart G, Severance Pay.
- D. 5 C.F.R. § 330.203, Eligibility due to RIF
- E. DOD Civilian Personnel Manual (DODI 1400.25), Chapter 1800, Priority Placement Program (Reissued April 2009).
- F. AR 690-351-1, Reduction in Force (7 Feb 92).
- G. SECNAVINST 12351.5G (3 Jan 12).
- H. OPM Reduction in Force Resource Page (Regulations, Guidance, and Information Resources): <http://www.opm.gov/policy-data-oversight/workforce-restructuring/reductions-in-force/> - url=Overview.
- I. A GUIDE TO MERIT SYSTEMS PROTECTION BOARD LAW & PRACTICE, Chapter 10: Reductions in Force, Peter B. Broida, Dewey Publications Inc., P.O. Box 663, Arlington, VA 22216; www.deweypub.com. Updated annually.
- J. A GUIDE TO FEDERAL LABOR RELATIONS AUTHORITY LAW AND PRACTICE, Chapter 6: Reductions in Force, Peter B. Broida, Dewey Publications, Inc., P. O. Box 663, Arlington, Virginia 22216; <http://www.deweypub.com>. Updated annually.

- K. Jerome and Rosemary Hardiman, RIFs AND FURLOUGHs: A COMPLETE GUIDE TO RIGHTS AND PROCEDURES, (Consolidated Resource Group, Inc. 1993).

III. ACTIONS TO ACCOMPLISH PERSONNEL REDUCTIONS.

- A. Limit, Freeze, or Selective Hiring.
- B. Release of Temporary Employees.
- C. Voluntary Early Retirement Programs.
- D. Contract Out.
- E. Furlough.
- F. Reduction in Force.
- G. Transfer of Function.

IV. REDUCTION IN FORCE (RIF).

- A. Definition. 5 C.F.R. § 351.201(a)(2). A RIF is the release of “a competing employee from his or her competitive level by furlough for more than 30 days, separation, demotion, or reassignment requiring displacement, when the release is required because of lack of work; shortage of funds; insufficient personnel ceiling; reorganization; the exercise of reemployment rights or restoration rights; or reclassification of an employee's position due to erosion of duties when such action will take effect after an agency has formally announced a reduction in force in the employee's competitive area and when the reduction in force will take effect within 180 days.”
- B. Grounds for a RIF. 5 C.F.R. § 351.201(a)(2).

1. An agency may invoke a RIF only for certain permissible reasons, including:
 - a. Lack of work.
 - b. Shortage of funds.
 - c. Insufficient personnel ceiling.
 - d. Reorganization.
 - e. Individual's exercise of reemployment or restoration rights.
 - f. Reclassification due to erosion of duties.
 - g. Contracting out.
2. An agency may not use RIF procedures for other purposes, *e.g.*, attempt to circumvent an employee's procedural rights in an adverse action for cause (misconduct or unacceptable performance). *See, e.g., Fitzgerald v. Hampton*, 467 F.2d 755 (D.C. Cir. 1972); *Carter v. Dep't of Army*, 62 M.S.P.R. 393 (1994), *aff'd*, 45 F.3d 444 (Fed. Cir. 1995) (Table).
3. An agency must show by preponderant evidence that it invoked RIF regulations for one of the legitimate management reasons specified in 5 C.F.R. § 351.201(a)(2); *Benkert v. Dep't of Navy*, 72 M.S.P.R. 432 (1996). Once the agency has shown that it invoked RIF regulations for a permissible reason, the MSPB lacks authority to review the management considerations underlying the exercise of the agency's discretion. *Schroeder v. Dep't of Transp.*, 60 M.S.P.R. 566 (1994) (citing *Winchester v. Tennessee Valley Auth.*, 55 M.S.P.R. 485 (1992)); *Anderson v. Dep't of Defense*, 48 M.S.P.R. 388 (1991).

4. The Board sustained the agency's RIF even though it was based on a projected loss of funds (due to a proposed budget reduction pending in Congress) rather than an actual, current lack of funding. In addition, the Board held that the agency did not have to publicly announce the RIF prior to enacting it by giving out specific notices to the affected employees. Finally, the Board found it was not error for the agency to run several RIFs simultaneously, each with different start-finish dates. *Shank v. Dep't of Interior*, 74 M.S.P.R. 454, *aff'd*, 132 F.2d 50 (Fed. Cir. 1997).
5. The Board will reverse a RIF action only if a procedural defect in application of regulations affects an employee's substantive entitlements. *Jicha v. Dep't of Navy*, 65 M.S.P.R. 73 (1994) (finding agency bears burden of proving a procedural defect had no substantive effect on an employee's rights).
6. The Board will enforce an agency's own policy or regulation regarding the implementation of a RIF, even ones that exceed those found in OPM regulations. *Warren v. Dep't of Defense*, 87 M.S.P.R. 426, 431 (2001) (items concerning RIF implementation were in agency's negotiated agreement with the union).

C. Determining Employee Retention Rights in a RIF Action.

1. Establishing the scope of competition--determining the competitive area and competitive levels.
 - a. Competitive area. An organizational and geographical boundary within which employees compete in a reduction in force. 5 C.F.R. § 351.402.
 - (1) The competitive area need not be larger than the commuting area. Generally, the competitive area in the military departments is the local installation. The minimum competitive area is a bureau, major command, directorate, or other equivalent major subdivision of an agency within a local commuting area. "Just because a few employees may travel great distances and endure substantial commute times, the agency is not obligated to reflect these extremes in establishing competitive areas." *Kelley v. Dep't of Defense*, 71 M.S.P.R. 568 (1996), *aff'd*, 107 F.3d 30 (Fed. Cir. 1997).

- (2) Agency has the burden of proving, by preponderant evidence, that the competitive area was properly established. *O'Brien v. Office of Personnel Mgmt.*, 144 F.3d 1458, 1460 (Fed. Cir. 1998).
 - (3) An agency may, but need not, expand the competitive area to provide *actual* competition. This is left solely to the agency's discretion. *Ginnodo v. Office of Personnel Mgt.*, 753 F.2d 1061 (Fed. Cir. 1985), *cert den'd*, 474 U.S. 848 (1985).
 - (4) Illustration. See RIF Chart #1 at App. 1.
- b. Competitive level. All positions in a competitive area which are in the same grade (or occupational level) and classification series, and which are similar enough in duties, qualification requirements, pay schedules, and working conditions so that an agency may reassign the incumbent of one position to any of the other positions in the level without undue interruption. 5 C.F.R. § 351.403(a).
- (1) Agency has the burden of showing (by preponderance) that the competitive levels were properly established. *Jicha v. Dep't of Navy*, 65 M.S.P.R. 73 (1994); *Griffin v. Dep't of Navy*, 64 M.S.P.R. 561 (1994).
 - (2) Competitive levels must be established based on the position description and not the qualifications of the particular employee occupying the position. 5 C.F.R. § 351.403(a)(2); *Jicha v. Dep't of Navy*, 65 M.S.P.R. 73 (1994); *O'Donnell v. Department of Army*, 13 M.S.P.R. 104 (1982).
 - (3) Separate competitive levels required by service (excepted and competitive service), appointment authority, pay schedule, work schedule, and trainee status. 5 C.F.R. § 351.403(b).
 - (4) Illustration. See RIF Chart #2 at App. 2.

2. Preparing the retention register for each competitive level. 5 C.F.R. § 351.404. DOD uses a computer program called AutoRIF to process RIFs and to maintain required documentation.
 - a. Tenure group. 5 C.F.R. § 351.501; 5 C.F.R. §351.502.
 - (1) Group I--career employees.
 - (2) Group II--career conditional employees (less than 3 years of service).
 - (3) Group III--term and temporary employees.
 - b. Veterans' preference (subgroup). 5 C.F.R. § 351.501(c).
 - (1) Subgroup AD--preference eligible employees with service connected disabilities of 30% or more.
 - (2) Subgroup A--other preference eligible employees.
 - (a) **NOTE:** Generally, a retired member of the military is not considered preference eligible for RIF purposes. For exceptions, see 5 C.F.R. § 351.501(d).
 - (3) Subgroup B--nonpreference eligible employees.
 - c. Length of Service--stated in years of creditable service. 5 C.F.R. § 351.503.
 - d. Credit for Performance (retention service credit). 5 C.F.R. § 351.504; *Veneziano v. Dep't of Energy*, 189 F.3d 1363 (Fed. Cir. 1999). The employee receives the average of the three ratings of record in the four years before the RIF:
 - (1) 20 years of credit for exceptional (outstanding);

- (2) 16 years of credit for highly successful (exceeds fully successful);
 - (3) 12 years of credit for fully successful.
- e. Missed ratings. For retention service credit for employees who do not have three ratings during the four-year period see 5 C.F.R. § 351.504(c).
 - f. Single and Multiple Rating Patterns. See 5 C.F.R. § 351.504(d), § 351.504(e).
 - g. Basic Illustration. See RIF Chart #3 at App. 3.

D. Release from Competitive Level.

- 1. When a position is abolished within a competitive level, the incumbent is not necessarily released from the competitive level. The employee competes to remain in the competitive level (first round competition). Noncompeting employees within the competitive level are released first (e.g., temporary appointees).
- 2. Order of release--inverse order of retention standing. 5 C.F.R. § 351.601. If competition among employees within the competitive level is necessary, they are selected for release in inverse order of retention standing. Employees in Group III are released before employees in Group II, and employees in Group II are released before employees in Group I. Within tenure subgroups, employees in Subgroup B are released before employees in Subgroup A, and employees in Subgroup A are released before employees in Subgroup AD.
- 3. Assignment Rights. Following release from a competitive level, an employee may be eligible to be assigned to a position in another competitive level (second round competition). The employee must be qualified for the offered position, the position shall be in the same competitive area, last at least three months, and have the same type of work schedule as the position from which the employee is released. 5

C.F.R. § 351.701(a).

a. Bumping: Employee's right of assignment to a position occupied by another employee in a lower tenure group (I, II, III) or in a lower subgroup (AD, A, B) in another competitive level in the same competitive area (within three-grade intervals). 5 C.F.R. § 351.701(b).

(1) Example: Employee in Group I, Subgroup AD has bump rights over employees in Groups IA, IB, II, and III.

b. Retreating: Employee's right of assignment to a position formerly held, or essentially identical to one previously held, when the position is occupied by a lower-standing employee in the same tenure subgroup, and is in another competitive level in the same competitive area (within three grade intervals). 5 C.F.R. § 351.701(c).

(1) Example: Employee in Group I, Subgroup A may retreat to a position held by a lower-standing Group IA employee. He may not retreat to a job held by a group IB employee because assignment to a lower subgroup is a bump.

(2) Essentially identical position. *Markham v. Dep't of Navy*, 66 M.S.P.R. 559 (1995); *Lockard v. Dep't. of Interior*, 74 M.S.P.R. 576 (1997) (newly created vacant and identical positions).

4. Separation or Furlough. An agency may furlough or separate under RIF procedures only when an employee has no right of assignment to another position or turns down an offered position satisfying the assignment right.

5. An employee is entitled to only one offer and has no right to a choice of positions. *Holland v. Dep't of Army*, 84 M.S.P.R. 269 (1999) (citing *Endsley v. Dep't of Army*, 55 M.S.P.R. 46 (1992)).

6. Voluntary acceptance of lower graded position. An assignment to a lower-grade position constitutes a RIF demotion even when the employee voluntarily applies for or is offered an assignment to that position, as long as the assignment was made after the agency had informed the employee that his original position had been abolished and that he had not been selected for assignment to a position at his former level. *Harants v. U.S. Postal Serv.*, 130 F.3d 1466, 1468 (Fed. Cir. 1997); *Burger v. U.S. Postal Serv.*, 93 M.S.P.R. 582 (2003) (employees were not subjected to RIF demotions appealable to the Board where they either did not have their positions abolished when they bid for and accepted lower-grade jobs, had their jobs abolished but were never assigned to positions at a lower grade than their former positions, or bid for and accepted lower-grade positions after their positions were abolished but without the agency ever having expressly told them they would not be assigned to positions at their former grade levels).

E. Notice Requirements. 5 C.F.R. Part 351, Subpart H.

1. General rule: Agency must give notice to employee and union at least 60 days before effective date of release. 5 C.F.R. § 351.801.
2. Exception: Agency may give less than 60 days (but more than 30 days) if:
 - a. Need to shorten notice period is caused by circumstances not reasonably foreseeable by the agency; and
 - b. OPM approves. 5 C.F.R. § 351.801(b).
3. Content. 5 C.F.R. § 351.802. The notice must inform the employee of:
 - a. Action to be taken.
 - b. Reason for the action.
 - c. Effective date.

- d. Competitive area, competitive level, subgroup, service date, and three most recent ratings of record during past four years.
- e. Right to inspect documents relied on and location of records.
- f. Exceptions to retention standing rules.
- g. Information on reemployment rights and other benefits.
- h. Appeal and if applicable, grievance rights.
- i. How to apply for state unemployment benefits and information on benefits available under the state's Workforce Investment Act of 1998 programs. 5 C.F.R. § 351.803.
- j. Estimate of severance pay, if eligible.
- k. A release to authorize, at employee's option, the release of his or her resume and other information for employment referral.

F. Appellate forum.

- 1. Merit Systems Protection Board. 5 C.F.R. § 351.901. The Board's jurisdiction in RIF appeals is conferred by OPM regulations.
 - a. No MSPB jurisdiction. Employees who voluntarily leave their positions in advance of an imminent RIF do not suffer an appealable adverse action. *Krizman v. MSPB*, 77 F.3d 434 (Fed. Cir. 1996); *Mueller v. U.S. Postal Serv.*, 76 F.3d 1198 (Fed. Cir. 1996).

- b. Prohibited Personnel Practices. Where an employee raises allegations that a RIF is per se a prohibited personnel practice, that employee may elect to appeal the RIF either to the MSPB or go through the negotiated grievance procedure. 5 U.S.C. § 7121(d).
- c. Unfair Labor Practices. If a RIF is alleged to constitute a ULP, it may be appealed under the negotiated grievance procedure or ULP procedures to the Federal Labor Relations Authority, but not both. 5 U.S.C. § 7116(d).

G. Common appellate issues.

- 1. Challenge to competitive area. *Ginnodo v. Office of Personnel Mgt.*, 753 F.2d 1061 (Fed. Cir. 1985), *cert. den'd*, 474 U.S. 848 (1985); *Kelley v. Dep't of Defense*, 107 F.3d 30 (Fed. Cir. 1997).
- 2. Challenge to competitive level. *Heelen v. Dep't of Commerce*, 154 F.3d 1306 (Fed. Cir. 1998); *Deweese v. Tennessee Valley Auth.*, 35 F.3d 538 (Fed. Cir. 1994); *Jicha v. Dep't of Navy*, 65 M.S.P.R. 73 (1994); *Salazar v. Dep't of Transp.*, 60 M.S.P.R. 633 (1994); *Johnson v. Tennessee Valley Auth.*, 8 M.S.P.R. 135 (1985).
- 3. Assignment rights. *Henderson v. Dep't of Interior*, 202 F.3d 1356 (Fed. Cir. 2000) (retreat rights); *Markham v. Dep't of Navy*, 66 M.S.P.R. 559 (1995); *McMillan v. Dep't of Army*, 84 M.S.P.R. 476 (1999).
- 4. Constructive demotion. *Torain v. United States Postal Serv.*, 83 F.3d 1420 (Fed. Cir. 1996); *Campbell v. Dep't of Treasury*, 61 M.S.P.R. 99 (1994).
- 5. Constructive service credit for performance appraisals. *Veneziano v. Dep't of Energy*, 189 F.3d 1363 (Fed. Cir. 1999); *Williams v. Dep't of Navy*, 43 M.S.P.R. 262 (1990).

6. Challenge to contracting out. *Kalash v. Dep't of Transp.*, 56 M.S.P.R. 517, *aff'd*, 6 F.3d 787 (Fed. Cir. 1993); *Mumford v. Dept. of Navy*, 39 M.S.P.R. 579 (1989); *Griffin v. Dep't of Agriculture*, 2 M.S.P.R. 168 (1980).
 7. Challenge to the bona fides reason for the RIF. *Cross v. Dep't of Transp.*, 127 F.3d 1443 (Fed. Cir. 1997); *Schroeder v. Dep't of Transp.*, 60 M.S.P.R. 566 (1994); *Hoover v. Dep't of Navy*, 57 M.S.P.R. 545 (1993); *Winchester v. Tennessee Valley Auth.*, 55 M.S.P.R. 485 (1992).
- H. Corrective action. If errors are discovered, the record is examined to determine whether correction of the error would affect the outcome (harmless error). If the absence of error would not have made a difference, the action will not be reversed. If the agency does not prove the error was harmless, the action will be reversed. *Jicha v. Dep't of Navy*, 65 M.S.P.R. 73 (1994); *Martin v. Dep't of Navy*, 61 M.S.P.R. 21, 26-27 (1994).

V. TRANSFER OF FUNCTION (TOF).

- A. Definition. When the work (function) of one or more employees is moved from one competitive area to another and the gaining area undertakes a function it did not previously perform. 5 C.F.R. §§ 351.203 and 351.301. *Hayes v. HHS*, 829 F.2d 1092 (Fed. Cir. 1987), *cert. den'd*, 482 U.S. 913 (1987); *McLean v. Dep't of Army*, 55 M.S.P.R. 414 (1992).
- B. Impact on Employees.
 1. Employee performing the function in the losing area has the right to transfer with the function, but only if the alternative in the losing activity is separation or demotion. 5 C.F.R. § 351.302(c).
 2. If an employee elects not to transfer, the agency has the option of separating the employee or including the employee in a concurrent RIF. 5 C.F.R. § 351.302(d) and (e).

- C. Appeal Rights. Employees have no right to appeal a transfer of function per se; however, demotion or separation by RIF resulting from the transfer of function may be appealable. *McLean v. Dep't of Army*, 55 M.S.P.R. 414 (1992); *Brown v. Dep't of Air Force*, 4 M.S.P.R. 221 (1980).

VI. DISPLACED EMPLOYEE BENEFITS.

- A. Placement Assistance Programs. DODI 1400.20, "DoD Program for Stability of Civilian Employment" (Sep. 2006).
 - 1. DOD Priority Placement Program. DOD Instruction (DODI 1400.25), Chapter 1800; DODI 1400.20. DOD maintains a strong placement assistance program, the Priority Placement Program (PPP), to minimize the adverse effects on employees caused by such actions as RIFs, base closures, realignments, consolidations, contracting-out actions, position classification decisions, rotations from overseas, and transfers of function (TOFs). Employees who have been adversely affected through no fault of their own are registered in the Automated Stopper and Referral System (ASARS), an automated placement database and system operated by the Priority Placement Support Branch.
 - 2. Reemployment Priority List (RPL). 5 C.F.R. Part 330, Subpart B. Agencies must give reemployment consideration to its competitive service employees separated by RIF or those who are fully recovered from a compensable injury after more than one year. Each agency must maintain an RPL for each commuting area. DOD is considered an "agency" for purposes of this program, so all DOD activities within the commuting area must utilize a single RPL and are responsible for giving priority consideration to the RPL registrants. RPL eligibles receive priority consideration for reemployment across DOD components.
 - 3. OPM Displaced Employee Program. The DEP is a voluntary program for career or career conditional employees who have been displaced or are scheduled to be displaced because of RIF or inability to accept assignment to another area when affected by a transfer of function. Displaced employees are given priority referral to Federal agencies so that they may be considered for employment ahead of eligibles on OPM registers.

4. Army Career Alumni Program (ACAP).
 5. Local outplacement efforts.
- B. Other RIF Benefits.
1. Grade and pay retention. 5 C.F.R. Part 536. *Paul v. Dep't of Navy*, 80 M.S.P.R. 174 (1998); *Jones v. Dep't of Army*, 42 M.S.P.R. 680 (1990).
 2. Severance pay. 5 C.F.R. Part 550, Subpart G.
 3. Unemployment compensation. DODI 1400.25, Subchapter 850. The unemployment compensation for Federal Employees (UCFE) program provides unemployment benefits to Federal workers similar to those provided by State unemployment insurance laws to workers in private industry. States, through agreement with the Secretary of Labor, act as agents in administering this program. The Civilian Personnel Advisory Center has a representative who serves as program administrator and liaison with the various State Unemployment Offices.
 4. Lump sum payment for unused annual leave. 5 C.F.R. Part 550, Subpart L.
 5. Retirement.

VII. LABOR MANAGEMENT ISSUES.

- A. RIF's.
1. The decision to conduct a RIF is a management right under 5 U.S.C. § 7106(a)(2). *Dep't of Defense, Dep't of Army, Fort Sam Houston and AFGE Local 2154*, 8 FLRA 623 (1982).

2. Many of the Labor-management issues involved in RIF's revolve around the negotiability of various issues, including competitive levels and competitive areas.
 - a. An agency is required to bargain over a proposal that requires it to follow RIF regulations; however, there is no obligation to bargain over a provision that defined a RIF to include reclassification due to changes in duties. *NTEU v. Dep't of Treasury, Financial Management Service*, 29 FLRA 422 (1987). Moreover, an agency must bargain over its use of RIF principles when separating or downgrading an employee through no fault of the employee. *NAGE Local R7-23 and Scott AFB*, 26 FLRA 916 (1987).
 - b. There is no obligation to bargain over competitive levels since the right to retain or layoff is nonnegotiable under 5 U.S.C. § 7106(a)(2)(A). *American Federation of Government Employees, Local 12, AFL-CIO and Dep't of Labor*, 17 FLRA 674 (1985).
 - c. Although an agency decision to conduct a RIF is not negotiable, an agency is still required to negotiate the impact and implementation of the decision (I & I bargaining). *Dep't of Health and Human Services, Social Security Administration, Baltimore, Maryland and American Federation of Government Employees, AFL-CIO*, 22 FLRA 91 (1986).

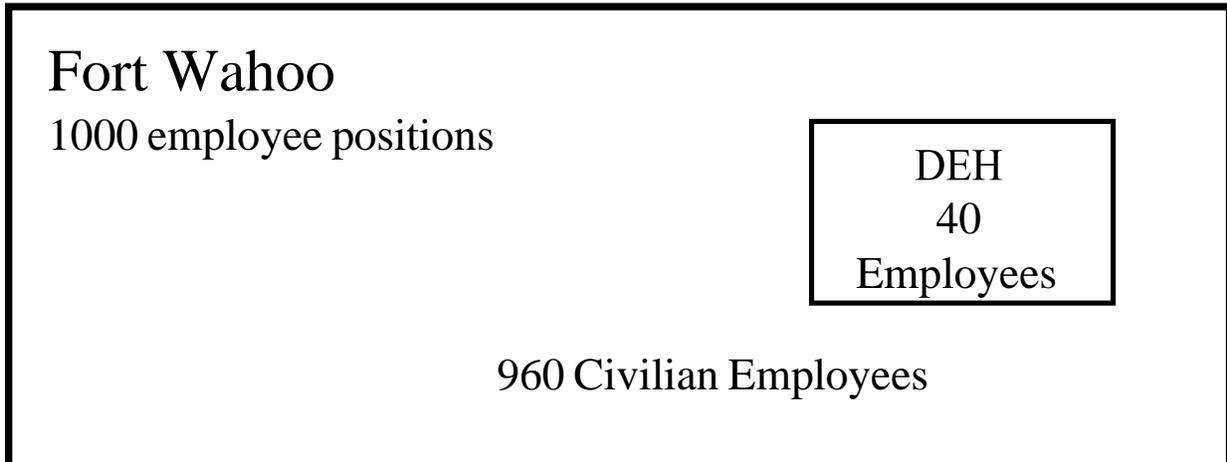
B. Transfer of Function.

1. Most bargaining obligations for transfers of function involve impact and implementation bargaining. *See generally, AFGE Local 3673, and Dep't of the Navy, NAWC, Trenton*, 50 FLRA 720 (1995); *NFFE Local 29 and Dep't of the Army, ACOE, Kansas City District*, 33 FLRA 507 (1988).

VIII. CONCLUSION.

RIF CHART #1

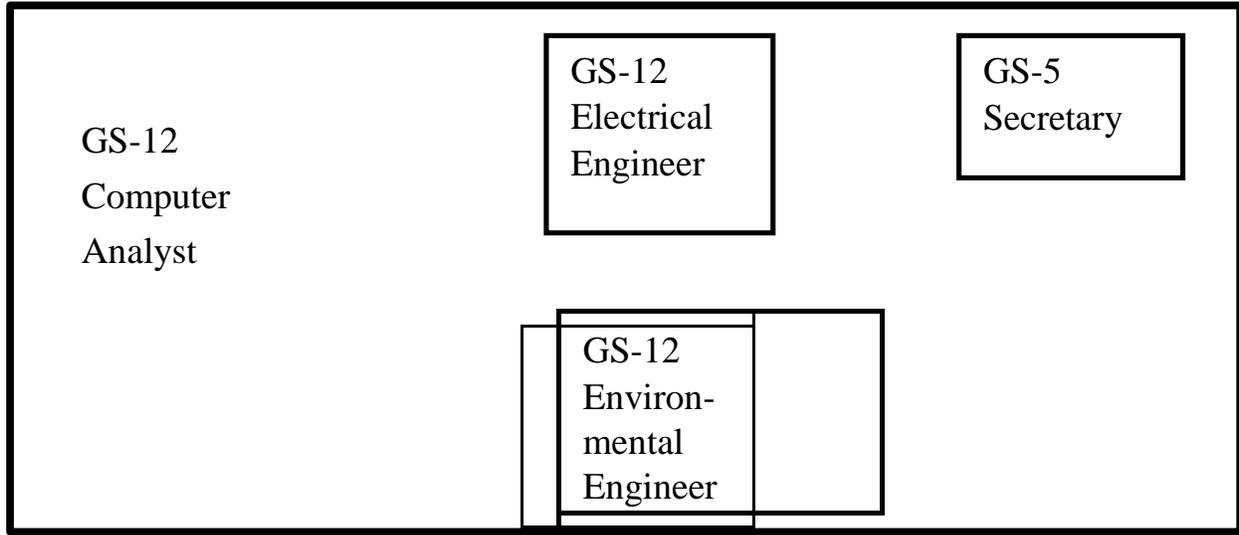
COMPETITIVE AREA



1. If there are 1,000 employee positions (all filled) at Fort Wahoo and 40 of these, in DEH, are to be abolished, there will be 1,000 employees competing for the remaining 960 positions.
2. The 40 employees within DEH are not automatically the ones to be released.
3. The competitive area is the first limit on competition.
4. The scope of competition is further limited within the competitive area by grade and occupation. This is a further, narrower grouping of employees called the competitive level.

RIF CHART #2

COMPETITIVE LEVELS



1. Every position in the competitive area must be assigned to a competitive level. A competitive level consists of all positions of the same grade within the competitive area that are so similar in important respects (pay schedule, classification series, service, duties, and responsibilities, qualifications, etc.) that people who occupy them are virtually interchangeable.
2. Remember that this is a limit on the scope of competition.
3. During the first round of competition, employees compete only with other employees in their competitive level. Example: GS-12 Computer Analyst competes only with other GS-12 Computer Analysts, not with anyone else. If there are eight GS-12 Computer Analysts on Fort Wahoo and one of those eight is in DEH, all eight Computer Analysts at Fort Wahoo will compete for the remaining seven GS-12 Computer Analyst jobs at Fort Wahoo (the competitive area).

RIF CHART #3

RETENTION REGISTER (COMPETITIVE SERVICE)

Group I (Career employees - highest retention standing)

AD (30% service-connected disability - preference eligible)

A (other preference eligible employees)

1. X = person whose job is abolished

B (nonpreference eligible employees)

Group II (Career conditional/probationary employees)

AD

A

B

1. Y = person with lowest retention standing in this competitive level

Group III (Indefinite/term employees) (assume no one in Group III)

AD

A

B

Example: X's job is being abolished. X will replace Y, who has the lowest retention standing in this example. X is reassigned, but not out of his competitive level; therefore, X is not an adversely affected federal employee. Y is an adversely affected federal employee.

Chapter O

Emergency Essential Civilians

TABLE OF CONTENTS

I. REFERENCES.....	2
II. INTRODUCTION.....	3
III. DESIGNATING EMERGENCY ESSENTIAL POSITIONS.....	4
IV. DEPLOYMENT PREPARATION.....	12
V. COMMAND AND CONTROL DURING DEPLOYMENT.....	17
VI. PAY AND ALLOWANCES DURING DEPLOYMENT.....	17
VII. MILITARY EXTRATERRITORIAL JURISDICTION ACT.....	22
VIII. UCMJ JURISDICTION OVER DOD CIVILIAN EMPLOYEES....	26
IX. CONCLUSION.....	27

Administrative and Civil Law Department
The Judge Advocate General's Legal Center and School

Emergency Essential Civilians

I. REFERENCES.

A. Federal Statutes and Regulations.

1. Criteria for Designating Emergency Essential Employees, 10 U.S.C. § 1580.
2. Anthrax Notification Requirements, 10 U.S.C. § 1580a.
3. Limitation on Premium Pay, 5 U.S.C. § 5547.
4. Federal Employees' Compensation Act (FECA), 5 U.S.C. § 8101.
5. Hours of Duty, 5 C.F.R. § 610.
6. Military Extraterritorial Jurisdiction Act (MEJA) of 2000, 18 U.S.C. §3261.

B. Department of Defense (DOD) Directives, Instructions, and Service Regulations.

1. DOD Directive 1404.10, DOD Civilian Expeditionary Workforce (23 Jan. 2009).
2. DOD Directive 1400.31, DOD Civilian Work Force Contingency and Emergency Planning and Execution (28 Apr. 1995).
3. DODI 1400.32, DOD Civilian Work Force Contingency and Emergency Planning Guidelines and Procedures (24 Apr. 1995).
4. DODI 1000.13, Identification Cards for Members of the Uniformed Services, Their Dependents, and Other Eligible Individuals (5 Dec. 1997).

5. DODI 5525.11, Criminal Jurisdiction Over Civilians Employed By or Accompanying the Armed Forces Outside the United States, Certain Service Members, and Former Service Members (3 Mar. 2005).
6. AR 690-11, Use and Management of Civilian Personnel in Support of Military Contingency Operations (26 May 2004).
7. AFI 36-3026, Identification Cards for Members of the Uniformed Services, Their Eligible Family Members, and Other Eligible Personnel (20 Dec. 2002) (Joint Instruction Adopted by Order of the Secretaries of the Air Force, Army, Navy, Marine Corps and Coast Guard).
8. Army Pam. 690-47, DA Civilian Employee Deployment Guide (1 Nov. 1995).

B. Policy Guidance.

1. Army Civilian Personnel Online (CPOL) “Civilian Deployment/Mobilization” guidance, available at <http://cpol.army.mil/library/mobil/civ-mobil.html>.
2. Department of State Office Foreign Post Differential and Danger Pay, available at <http://aoprals.state.gov/>.

II. INTRODUCTION.

- A. Throughout our history, civilians have accompanied the force during operations. Recent operations highlight civilian employees’ importance to the military mission. Civilian employees perform a number of jobs formerly held by Soldiers, in areas as diverse as recreation specialists and intelligence analysts.
- B. An understanding of the process for designating, training, and directing the efforts of emergency-essential (EE) civilians while deployed is essential for Judge Advocates (JA) advising commanders.

III. DESIGNATING EMERGENCY ESSENTIAL POSITIONS.

A. Identify Emergency Essential Positions.

1. 10 U.S.C. §1580 Emergency Essential Designation.

- a. The Secretary of Defense or the Secretary of the military department concerned may designate as an emergency essential employee any employee of the Department of Defense, whether permanent or temporary, the duties of whose position meet all of the following criteria:
 - a. It is the duty of the employee to provide immediate and continuing support for combat operations or to support maintenance and repair of combat essential systems of the armed forces.
 - b. It is necessary for the employee to perform that duty in a combat zone after the evacuation of nonessential personnel, including any dependents of members of the armed forces, from the zone in connection with a war, a national emergency declared by Congress or the President, or the commencement of combat operations of the armed forces in the zone.
 - c. It is impracticable to convert the employee's position to a position authorized to be filled by a member of the armed forces because of a necessity for that duty to be performed without interruption.
- b. Employees of nonappropriated fund instrumentalities (NAFs) are eligible for designation as emergency essential employees.
- c. The term "combat zone" used in 10 U.S.C. 1580 has the meaning given that term in section 112(c)(2) of the Internal Revenue Code of 1986 [26 USCS § 112(c)(2)].

2. DODD 1404.10 Emergency Essential Designation, DODD 1404.10, para. 6.
 - a. Include civilian positions overseas or in the United States that would be transferred overseas in a crisis situation.
 - b. The specific crisis situation duties and responsibilities and physical requirements of each E-E position must be identified and documented to ensure that E-E employees know what is expected of them.
 - c. Documentation can be:
 - a. Annotation of E-E duties in existing peacetime position descriptions;
 - b. Brief statements of crisis situation duties attached to position descriptions if materially different than peacetime duties;
 - c. Separate E-E position descriptions.
 - d. Record E-E Position Designation. A statement shall be included in the position description of each E-E identified position.
 - a. Example: "This position is emergency-essential (E-E). In the event of a crisis situation, the incumbent, or designated alternate, must continue to perform the E-E duties until relieved by proper authority. The incumbent or the designated alternate may be required to take part in readiness exercises. This position cannot be vacated during a national emergency or mobilization without seriously impairing the capability of the organization to function effectively; therefore, the position is designated 'key,' which requires the incumbent, or designated alternate, to be screened from military recall status."

3. Ensure that civilian positions are designated "E-E" only when civilians are required for direct support to combat operations, or to combat systems support functions that must be continued and that could not otherwise be immediately met by using deployed military possessing the skills in the number and in the functions expected to be needed to meet combat operations or systems support requirements in a crisis situation. DODD 1404.10, para. 5.2.2.
4. Ensure that employees are identified to perform the duties of E-E positions, including the identification of alternates to cover vacant E-E positions or those in which the incumbents are unable to perform the duties or have not signed the E-E position agreement. DODD 1404.10, para. 5.2.3.
5. Issue E-E employees, or employees occupying positions determined to be E-E, the DD Form 489, "Geneva Convention Identity Card for Civilians Who Accompany the Armed Forces," or DD Form 1934, "Geneva Convention Identity Card for Medical and Religious Personnel Who Serve In or Accompany the Armed Forces," as appropriate. DODD 1404.10, para. 4.5.
6. Advise applicants for E-E positions that individuals selected to fill these positions are required to sign written agreements (DD Form 2365), "DOD Civilian Employee Overseas Emergency-Essential Position Agreement." DODD 1404.10, para. 4.6.
 - a. The agreements document that incumbents of E-E positions accept certain conditions of employment arising out of crisis situations wherein they shall be sent on temporary duty, shall relocate to duty stations in overseas areas, or continue to work in overseas areas after the evacuation of other U.S. citizen employees who are not in E-E positions.
 - b. All individuals selected for E-E positions must be exempted from recall to the military Reserves or recall to active duty for retired military.

7. Pre-identified positions. Employees assigned to positions previously designated as “E-E” must sign a DD Form 2365 as a condition of employment. The agreement specifies that the employee must continue to perform the duties and requirements of the E-E position in the event of crisis situation or wartime. For an E-E employee who occupies an overseas E-E position, this agreement takes precedence over any existing transportation agreement. AR 690-11, para. 1-10(a).

8. Positions not pre-identified. “Because of unforeseen circumstances, it may become necessary to identify positions as E-E that have not previously been so identified. These positions may be located overseas or may be positions in the United States from which an employee would be sent to the location of the military contingency or other crisis overseas.” AR 690-11, para. 1-10(b).
 - a. Overseas Position. “Employees in positions located overseas that are identified as E-E after the outbreak of a military crisis will be asked to execute an E-E agreement. If the employee declines, the employee will continue to perform the functions of the position if no other qualified employee or military member is reasonably available. The employee will be entitled to the benefits and protections of an E-E employee, but will be reassigned out of the position and assigned to a non-E-E position as soon as reasonably practicable under the circumstances.” AR 690-11, para. 1-10(b)(1).

- b. Non-Combat Essential (NCE). A position-based designation to support the expeditionary requirements in other than combat or combat support situations and will be designated as Key.
 - c. Capability-Based Volunteer (CBV). An employee who may be asked to volunteer for deployment, to remain behind after other civilians have evacuated, or to backfill other DoD civilians who have deployed to meet expeditionary requirements in order to ensure that critical expeditionary requirements that may fall outside or within the scope of an individual's position are fulfilled.
 - d. Capability-Based Former Employee Volunteer Corps. A collective group of former (including retired) DoD civilian employees who have agreed to be listed in a database as individuals who may be interested in returning to Federal service as a time-limited employee to serve expeditionary requirements or who can backfill for those serving other expeditionary requirements. When these individuals are re-employed, they shall be deemed CBV employees.
 - e. Key Employees. DoD civilian employees in positions designated as E-E and/or NCE will be designated Key in accordance with DoDD 1200.7.
- C. Notification of Anthrax Immunization Requirements. 10 U.S.C. 1580(a) requires SECDEF to:
- a. Prescribe regulations for the purpose of ensuring that any civilian employee of the Department of Defense who is determined to be E-E and who is required to participate in the anthrax vaccine immunization program is notified of the requirement to participate in the program and the consequences of a decision not to participate.
 - b. Ensure that any individual who is being considered for an E-E position that requires anthrax vaccination is notified of the obligation to participate in the program before being offered employment in the position.

- c. DOD / Army E-E Anthrax Policy: Current DOD and Army policies are all available online at <http://www.anthrax.mil>.
- 1) The statutory anthrax notice will be in writing and should be maintained with the employee's signed DD Form 2365 (E-E Position Agreement). See Memorandum dated June 25, 2001, Assistant SECDEF for Force Management, SUBJECT: Notifying Emergency-Essential Employees Regarding Anthrax Immunization Requirements.
 - 2) The referenced DOD Policy Memorandum dated 25 June 2001 contains a sample notification statement as follows:

"This is to notify you that your position has been designated as emergency essential. You may be required, as a condition of employment, to take the series of anthrax vaccine immunizations to include annual boosters. This may also include other immunizations that may in the future be required for this position, or for a position you may fill as an emergency essential alternate. Failure to take the immunizations may lead to your removal from this position or separation from Federal service."
 - 3) Acknowledgement: This is to acknowledge that I have read and fully understand the potential impact of the above statement" {employee signature and date}.
- d. 22 September 2004 Policy Expansion: DOD/DA policy is mandatory anthrax and smallpox vaccination for all EE and "equivalent" employees assigned to the Korean Peninsula for 15 or more consecutive days, or the CENTCOM area of responsibility (AOR) for any length of time, unless medically or administratively exempted. See DOD Memorandum, SUBJECT: Expansion of Force Health Protection Anthrax and Smallpox Immunization Programs for Emergency-Essential and Equivalent Department of Defense Civilian Employees", September 22, 2004.

- a. “Equivalent employees” are personnel whose duties meet all of the requirements of 10 U.S.C. 1580, but who have not been designated as emergency essential.
 - b. Other civilian employees, assigned to the same locations but not designated as emergency-essential or equivalent employees, as well as family members accompanying assigned civilian employees, continue to be covered by the policy of offering vaccinations on a voluntary basis.
 - e. Injunction issued against AVIP: “On 27 October 2004, the United States District Court for the District of Columbia issued an injunction against the current operation of the Anthrax Vaccine Immunization Program (AVIP). This new injunction is based on a conclusion by the Court that the Food and Drug Administration (FDA) was required by its regulations to solicit additional public comments before finalizing its conclusion that anthrax vaccine is safe and effective for protection against inhalational anthrax. While the Department of Defense, Food and Drug Administration, and Justice Department proceed with steps to clarify these legal issues, DOD will again, effective immediately, stop giving anthrax vaccinations until further notice.” See <http://www.anthrax.mil/whatsnew/pause.asp>.
 - f. Resumption of the AVIP Policy under an Emergency Use Authorization: Effective 29 April 2005, “[t]he DOD will resume anthrax vaccination for its personnel under specific conditions of the Emergency Use Authorization (EUA). The FDA granted the EUA with the condition that personnel designated to receive the anthrax vaccination may accept or refuse vaccination. Personnel refusing vaccination will not be punished. No disciplinary action or adverse personnel action will be taken. Personnel will not be processed for separation and there will not be a penalty or loss of entitlement for refusing anthrax vaccination under EUA. Personnel who refuse anthrax vaccination remain deployable.”
- D. Resumption of the AVIP Policy without the need for an extension of the Emergency Use Authorization (22 December 2005):

1. “On 15 Dec 2005, the FDA issued a Final Rule & Order on the license status of anthrax vaccine adsorbed (AVA). After reviewing extensive scientific evidence and carefully considering comments from the public, the FDA again determined that AVA is licensed for the prevention of anthrax, regardless of the route of exposure.”
2. “In response to the FDA's action, policy options for AVIP are now under review. Unless otherwise directed by the Secretary or Deputy Secretary of Defense, the services are directed to continue implementation of the AVIP as authorized in April 2005. This interim approach will protect the same personnel, and include an option to refuse and weekly reporting requirements.” See <http://www.anthrax.mil/documents/853continuation.pdf>.

E. Current AVIP Policy (as of 9 February 2007).

1. On 16 October 2006, the DOD announced a resumption of the mandatory AVIP for military personnel, emergency-essential DOD civilians and contractors, based on defined geographic areas or roles.
2. On 6 December 2006, the Under Secretary of Defense for Personnel and Readiness issued implementing instructions to the military services for resuming the mandatory vaccination program. However, the Assistant Secretary of Defense for Health Affairs must approve the Military Service implementation plans before they can take effect.
3. As of 9 February 2007, service implementation plans have been approved, however, mandatory vaccinations cannot start until the respective service plan has been released and disseminated. In the mean time, DOD AVIP will continue under the 22 December 2005 Rules and Conditions (voluntary participation). <http://www.anthrax.mil/whatsnew/resumemandatoryselect.asp>.

IV. DEPLOYMENT PREPARATION.

- A. E-E employees shall be provided protective equipment, work related training, law of war training, and training in the Uniform Code of Military Justice, commensurate with the anticipated threat and theater policy. DODD 1404.10, para. 6.9.8.

1. Protective Equipment Training Requirements. DODI 1400.32, para. 6.1.
 - a. Civilian employees should be issued (and trained in the use of) the same protective gear as is issued to military personnel in theater, to include lens inserts, if required.
 - b. All deploying Department of the Army (DA) civilians are expected to wear the appropriate military uniform, as determined and directed by the theater commander. Department of the Army Pamphlet 690-47 and AR 670-1 contain more details on the issuance and wear of military uniforms and equipment. Maintenance and accountability of military uniforms and equipment is the employee's responsibility. Personal clothing and care items are also the responsibility of the individual. Civilian employees should bring work clothing required by their particular job.

2. Miscellaneous Deployment Training and Recordkeeping Requirements. DODI 1400.32, para. 6.1.
 - a. Training for civilian employees on their responsibilities; e.g. standards of conduct, as well as coping skills if they become Prisoners of War.
 - b. Civilian employees shall receive the same immunizations as given to military personnel in theater.
 - c. Civilian employees shall be provided appropriate cultural awareness training for the theater if such training is being provided to military personnel.
 - d. Civilian employees shall be issued passports, visas, and country clearances. When theater conditions necessitate different requirements, the theater Commander will notify the appropriate Heads of DOD components expeditiously.
 - e. Civilian employees shall be issued any required security clearances expeditiously.

- f. Civilian employees will fill out DD Form 93, "Record of Emergency Data." Components will establish procedures to store and access civilian DD 93s that are the same as or parallel to those for military personnel.
 - g. Components will set up procedures for civilian casualty notification and assistance that parallel those for military personnel.
3. Medical Care for Deployed Civilians. DODI 1400.32, para. 6.10.10.
- a. Provisions shall be made for medical care of civilian employees in a theater of operations.
 - b. They shall be HIV-tested before deployment, if the country of deployment requires it.
 - DA policy (DA DCSPER/ OTJAG decision) is that in those isolated situations when a requirement exists for mandatory HIV screening, and the test is positive, a civilian can be deployed in support of a contingency operation as long as the host country is notified and the individual is able to perform assigned duties.
 - c. All DOD-sponsored non-military personnel PCS or TDY outside the United States and its Territories shall have panarex or DNA samples taken for identification purposes.
 - Dental x-rays may be substituted when the ability to take panarex or DNA samples is not available.
 - d. Civilians may also be issued "dog tags" for identification purposes.
 - Components shall establish procedures to store and access such identification data that are the same as or parallel to those for military personnel.

- e. Civilians shall receive medical and dental examinations and, if warranted, psychological evaluations to ensure fitness for duty in the theater of operations to support the military mission. DODI 1400.32, para. 6.1.11.
 - During a contingency or emergency, civilian employees returning to the United States and its Territories from a theater of operations shall receive cost-free military physical examinations within 30 days if the medical community decides it is warranted, or required for military personnel.

- f. Civilians shall carry with them a minimum of a 90-day supply of any medication they require. DODI 1400.32, para. 6.1.12.

- g. Civilians with dependents who are in or deploying to a theater of operations are encouraged to make Family Care Plans. DODI 1400.32, para. 6.1.13.
 - E-E civilian employees shall be advised that they are responsible for ensuring that an adequate family care plan is in place at all times. DODD 1404.10, para. 6.4.

- h. Civilians killed in a theater of operations shall be processed by Graves Registration personnel with procedures parallel to those for the military personnel. DODI 1400.32, para. 6.1.14.
 - An escort officer for the remains of civilians killed is authorized; and a flag shall be purchased for the casket at Government expense.

B. Eligibility to Receive Legal Assistance.

1. DOD civilian employees who are in the U.S., its possessions, or territories, and who are designated as “mission-essential” or “emergency-essential” civilian personnel, (and their family members on deployment-related matters, but only while the employee is deployed). (By virtue of this designation, at any time while they are encumbering such designated positions, these employees may receive legal assistance on matters related to their actual or possible deployment to a combat zone or on a contingency operation. Legal assistance is limited to matters, as determined by the supervising attorney, that relate to deployment. Legal assistance is authorized for employees and family members for a reasonable period after the employee returns from deployment to close out ongoing legal assistance matters related to deployment that arose before or during deployment.) AR 27-3, para. 2-5a(6)(d).
2. DOD civilian employees who are serving with the Armed Forces of the United States in a foreign country (and their family members who accompany them). AR 27-3, para. 2-5a(6)(b).
3. Civilians deploying to or in a theater of operations shall be furnished the opportunity and assistance with making wills and any necessary powers of attorney. DODI 1400.32, para. 6.1.15.

C. Weapons Certification and Training.

1. Under certain conditions Army civilians may be issued sidearms for their personal self-defense, subject to military regulations regarding training in proper use and safe handling of firearms. Acceptance of a sidearm is voluntary by the emergency-essential civilian. DA PAM 690-47, para. 1-12.
2. Authority to carry military firearms is contingent upon the approval and guidance of the supported Combatant/MACOM Commander. The Army Component Commander must make the decision early in the operation as to whether or not civilians may be armed.
3. Only government issued military firearms/ammunition are authorized. Familiarization training will be conducted IAW FM 3-23.35.

D. Clothing and Equipment Issue.

1. Organization Clothing and Individual Equipment (OCIE) will be issued to emergency-essential personnel and other civilians who may be deployed in support of military operations. DA PAM 690-47, para. 1-13.
2. Kevlar helmets, load bearing equipment, and chemical defensive equipment will be worn in a tactical environment in accordance with supported unit procedures.
3. Maintenance and accountability of E-E clothing and equipment is the responsibility of the employee to whom the items were issued.
4. Items of personal clothing and personal care are the responsibility of the individual. Civilian employees should bring work clothing required by their particular job.

V. COMMAND AND CONTROL DURING DEPLOYMENTS.

- A. During a crisis situation or deployment, civilian employees are under the direct command and control of the on-site supervisory chain. Therefore, the on-site supervisory chain will perform the normal supervisory functions; for example, those related to performance evaluations, task assignments and instructions, and initiating and effecting recognition and disciplinary actions. DA PAM 690-47, para. 1-4.
- B. The on-site commander may impose special rules, policies, directives, and orders based on mission necessity, safety, and unit cohesion. These restrictions need only be considered reasonable in the circumstance of the deployment to be enforceable. DA PAM 690-47, para. 1-18.

VI. PAY AND ALLOWANCES DURING DEPLOYMENTS.

- A. Tax Consequences of Civilian Deployed Pay. There is no tax exclusion for civilian employees similar to the combat tax exclusion for military members. DA PAM 690-47, para. 1-24.
- B. Tour of Duty. 5 U.S.C. § 6101; 5 C.F.R. § 610.121; 5 U.S.C. § 6131.

1. The administrative workweek constitutes the regularly scheduled hours for which a deployed employee must receive basic and premium pay. Under some conditions, hours worked beyond the administrative workweek may be considered to be irregular and occasional, and compensatory time may be authorized in lieu of overtime/premium pay. DA PAM 690-47, para. 1-30.
 2. The authority for establishing and changing the tours of duty for civilian employees is delegated to the in-theater commander or his representative. The duration of the duty is dependent upon the particular operation and will be established by the in-theater commander.
- C. Overtime. GS employees whose basic rates of pay do not exceed that of a GS-10 step 1, will be paid at a rate of one and one-half times their basic hourly pay rate for each hour of work authorized and approved over the normal 8 hour day or 40 hour week. Employees whose rate exceeds that of a GS-10, step 1, will be paid at the rate of one and one-half times the basic hourly rate of a GS-10, step 1 or their basic rate of pay, whichever amount is *greater* (per 2004 Defense Authorization Act). DA PAM 690-47, para. 1-26.
1. If overtime is not approved in advance, the employee's travel orders should have this statement in the remarks column:
"Overtime authorized at TDY site as required by the Field Commander. Time and attendance reports should be sent to (name and address)." The field commander should then submit to the employee's home installation a DA Form 5172-R, or local authorization form (with a copy of the travel orders), documenting the actual premium hours worked by each employee for each day of the pay period as soon as possible after the premium hours are worked.

2. Premium Pay Limitations. Normally, the aggregate rate of pay (including base and premium pay) for any pay period is limited to the greater of the biweekly rate of pay for GS-15, Step 10 or Level V of the Executive Schedule. 5 U.S.C. § 5547. This biweekly limitation does not apply to work performed in connection with an emergency that involves a direct threat to life or property or work that is critical to the agency's mission. General Schedule employees may receive premium pay as long as the annual total (basic plus premium pay) does not exceed the greater of the annual rate for GS-15, step 10 or Level V of the Executive Schedule. By administrative extension, this emergency authority to apply the annual limitation also applies to NAF payband employees. Within DOD, the authority to determine the existence of an emergency has been delegated to officials who exercise personnel appointing authority (normally the head of an installation or activity). DOD 1400.25-M, SC 550, § 551.501(d). Wage Grade employees are not subject to the premium pay limitations described above.
- D. On-Call Employees. During crisis situations, the nature of the work may make it necessary to have employees "on-call" because of emergencies or administrative requirements that might occur outside the established work hours. 5 CFR § 610.102(h).
1. On-site commanders may designate employees to be available for such a call during off-duty times. Designation of employees for this purpose will follow these guidelines:
 - a. There should be a definite possibility that the services of the designated employee might be required;
 - b. On-call duties required of the employees will be brought to the attention of all employees concerned;
 - c. If more than one employee could be used for on-call service, the designation should be made on a rotating basis; and
 - d. On call duty should not unduly restrict movement.

2. The designation of employees to be "on-call" or in an "alert" posture will not, in itself, serve as a basis for additional compensation (i.e., overtime or compensatory time). If an employee is called in, the employee must be compensated for a minimum of two hours.
- E. Leave Accumulation. Any annual leave in excess of the maximum permissible carry over is automatically forfeited at the end of the leave year. 5 U.S.C. § 6304. Annual leave forfeited during a combat or crisis situation, which has been determined by appropriate authority to constitute an exigency of the public business, may be restored for future use. 5 U.S.C. § 6304(d)(1)(B). The employee must file for leave carry over.
- F. Foreign Post Differential. 5 U.S.C. § 5925. Employees assigned to work in foreign areas where the environmental conditions either differ substantially from CONUS conditions or warrant added compensation as a recruiting and retention incentive are eligible for Foreign Post Differential (FPD) after being stationed in the area in excess of 41 days.
1. FPD is exempt from the pay cap and is paid as a percentage of the basic pay rate not to exceed 35% of the basic pay.
 2. The Department of State determines areas entitled to receive FPD and the FPD rate for the area. The Department of State also determines the length of time the rate is in effect. Different areas in the same country can have different rates.
- G. Danger Pay. 5 U.S.C. § 5928. Civilian employees serving at or assigned to foreign areas designated for danger pay by the Secretary of State, because of civil insurrection, civil war, terrorism or wartime conditions which threaten physical harm or imminent danger to the health or well being of a majority of employees stationed or detailed to that area, will receive a danger pay allowance (DPA).
1. The allowance will be a percentage of the employee's basic compensation at the rates of 15, 20, 25, 30 or 35 percent as determined by the Secretary of State. This allowance is in addition to any foreign post differential prescribed for the area but in lieu of any special incentive differential authorized the post prior to its designation as a danger pay area.

- The foreign post differential may be reduced by any part attributable to political violence. The combined danger pay and post differential must be at least 5 percent above the previous combined post differential and special incentive differential at the post, if any, in effect at the post prior to its designation as a danger pay area.
2. The DPA commences for employees already in the area on the date of the area's designation for danger. For employees later assigned or detailed to the area, DPA commences upon arrival in the area. For employees returning to the post after a temporary absence it commences on the date of return.
 3. DPA will terminate with the close of business on the date the Secretary of State removes the danger pay designation for the area or on the day the employee leaves the post for any reason for an area not designated for the DPA.
 - The DPA paid to Federal civilian employees should not be confused with the Imminent Danger Pay (IDP) paid to the military. The IDP is triggered by different circumstances and is not controlled by the Secretary of State.
- H. Hostile Fire Pay. 5 U.S.C. § 5949. Allows payment of \$150 per month, but not payable to employees already receiving danger pay allowance.
- I. Life Insurance. 5 U.S.C. §8702. Federal civilian employees are eligible for coverage under the Federal Employees Group Life Insurance (FEGLI) program. Death benefits (under basic and all forms of optional coverage) are payable regardless of cause of death.
- The Office of Personnel Management (OPM) has confirmed that civilians who are deployed with the military to combat support roles during times of crises are not "in actual combat" and are entitled to accidental death and dismemberment benefits under FEGLI in the event of death. Similarly, civilians carrying military firearms for personal protection are not "in actual combat." DA PAM 690-47, para. 1-35.

**VII. MILITARY EXTRATERRITORIAL JURISDICTION ACT OF 2000
18 U.S.C. § 3261 (“MEJA”).**

- A. Background. Since the 1950s, the military has been prohibited from prosecuting by courts-martial civilians accompanying the Armed Forces overseas in peacetime who commit criminal offenses. Many Federal criminal statutes lack extraterritorial application, including those penalizing rape, robbery, burglary, and child sexual abuse. In addition, many foreign countries decline to prosecute crimes committed within their nation, particularly those involving another U.S. person as a victim or U.S. property. Furthermore, military members who commit crimes while overseas, but whose crimes are not discovered or fully investigated prior to their discharge from the Armed Forces are no longer subject to court-martial jurisdiction. The result is jurisdictional gaps where crimes go unpunished.

- B. Solution. The Military Extraterritorial Jurisdiction Act (MEJA) closes the jurisdictional gaps by extending Federal criminal jurisdiction to civilians overseas and former military members.

- C. What Is Covered.
 - 1. Conduct that is a crime under U.S. law in special maritime and territorial jurisdiction.
 - 2. Felony-level offenses, i.e., offenses punishable by imprisonment for more than 1 year.
 - 3. Conduct committed outside the United States.

- D. Who Is Covered.
 - 1. Civilians while “Employed by the Armed Forces.” This includes:

- a. Those present or residing outside the U.S. in connection with such employment who are (a) civilian employees of the DOD; (b) civilian employees of any other Federal agency, or any provisional authority, *to the extent such employment relates to supporting the mission of DOD overseas*; (c) DOD contractors (including subcontractors at any tier); (d) contractors of any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of DOD overseas; or (e) employees of a DOD contractor (including subcontractors at any tier) or of any other Federal agency as identified in paragraph (d) above.
 - b. But NOT a national or person ordinarily resident in the host nation.
2. Civilians “Accompanying the Armed Forces.” This includes:
- a. Those who are residing outside the U.S. and are dependents of:
 - a. Any of the above civilian employees/contractors.
 - b. Any member of the Armed Forces.
 - b. But NOT a national or person ordinarily resident in the host nation.
3. Former military members who commit such crimes while a member of the Armed Forces overseas, but who cease to be subject to Uniform Code of Military Justice (UCMJ) court-martial jurisdiction (e.g., discharged from the service) and have not previously been court-martialed for such offenses.

E. Limitations.

1. Foreign Criminal Jurisdiction. If a foreign government, in accordance with jurisdiction recognized by the U.S., has prosecuted or is prosecuting the person, the U.S. will not prosecute the person for the same offense, absent approval by the Attorney General or Deputy Attorney General.
2. Military Member as Co-Actor/Conspirator. Military members subject to the UCMJ will not be prosecuted under this Act, unless the member ceases to be subject to the UCMJ, or the indictment or information charges that the member committed the offense with one or more other defendants, at least one of whom is not subject to the UCMJ (i.e., this Act provides a limited exception to exclusive military UCMJ jurisdiction).
3. Juveniles. Juveniles are subject to the Federal Juvenile Delinquency Act (18 U.S.C. §§ 5031-5042). Juvenile delinquency is an adjudication of status, not a crime. In limited cases, juveniles over 13 may be tried as an adult.

- Federal courts cannot proceed against juveniles without Attorney General certification to the U.S. District Court that:
 - a. State courts do not have jurisdiction (e.g. overseas offense).
 - b. Offense is a crime of violence or violates the Controlled Substances Act, and
 - c. There is a substantial federal interest in the case or the offense to warrant the exercise of federal jurisdiction.

F. Removal to the U.S. and Initial Proceedings.

1. SECDEF is authorized to designate any DOD law enforcement person to make a probable cause arrest of persons for such U.S. felonies and promptly deliver these persons to the custody of U.S. civilian law enforcement for removal to the U.S. for judicial proceedings.

2. Limitations on Removal. The person arrested shall not be removed to another foreign country, other than where the offense was committed, or to the U.S., except when ordered by a Federal magistrate judge for:
 - a. Presence in the U.S. at a detention hearing;
 - b. Pretrial detention;
 - c. Preliminary examination, when person is entitled to one and does not waive it; or
 - d. When otherwise ordered by the Federal magistrate judge.
3. Overseas Transfer. When SECDEF determines that military necessity requires waiver of limitations on removal, then person may be removed to the nearest U.S. military installation outside the U.S. adequate to detain the person and facilitate the initial appearance required by the Act.

G. Initial Proceedings.

1. Federal magistrate judge will conduct initial appearance proceeding, which may be carried out by telephone or other voice communication means, including counsel representation.
2. Federal magistrate judge will also determine probable cause that crime was committed and person committed it, and conditions of release if government counsel does not make a motion seeking pretrial detention.
3. Federal magistrate judge will also conduct any detention hearing required under federal law, which at the request of the person may be carried out overseas by telephonic means, including any counsel representing the person.
4. The Federal magistrate judge may appoint military counsel for limited purpose of overseas initial appearance proceedings.

H. MEJA Instruction (DODI 5525.11 (3 March 2005)).

1. “Implements policies and procedures, and assigns responsibilities, under the ‘Military Extraterritorial Jurisdiction Act of 2000,’ as amended by Section 1088 of the ‘Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005’ for exercising extraterritorial criminal jurisdiction over certain current and former members of the U.S. Armed Forces, and over civilians employed by or accompanying the U.S. Armed Forces outside the United States.” DODI 5525.11, paragraph 1.1.
2. “It is DOD policy that the requirement for order and discipline of the Armed Forces outside the United States extends to civilians employed by or accompanying the Armed Forces, and that such persons who engage in conduct constituting criminal offenses shall be held accountable for their actions, as appropriate.” DODI 5525.11, para. 3.

VIII. UCMJ JURISDICTION OVER DOD CIVILIAN EMPLOYEES.

I. UCMJ Jurisdiction Over DOD Civilian Employees. Article 2(a)(10), UCMJ

1. On 17 October 2006, the UCMJ was amended to extend UCMJ jurisdiction over persons serving with or accompanying U.S. armed forces in the field **in times of declared war or a contingency operation.**
2. This change allows court-martial jurisdiction to reach a great number of civilians who were not previously susceptible to court-martial jurisdiction.
3. When offenses alleged to have been committed by civilians violate U.S. federal criminal laws, DOD shall notify responsible Department of Justice (DOJ) authorities, and afford DOJ the opportunity to pursue its prosecution of the case in federal district court. While the DOJ notification and decision process is pending, commanders and military criminal investigators should continue to address the alleged crime.

4. Commanders should ensure that any preliminary military justice procedures that would be required in support of the exercise of UCMJ jurisdiction over civilians continue to be accomplished during the concurrent DOJ notification process. Commanders should be prepared to act, as appropriate, should possible U.S. federal criminal jurisdiction prove to be unavailable to address the alleged criminal behavior.

IX. CONCLUSION.

APPENDIX A - Table of Penalties for Various Offenses

The following Table of Penalties is found in **Army Regulations Online**: AR 690-700, Chapter 751. A Table of Penalties is a list of the infractions committed most frequently by agency employees, along with a suggested range of penalties for each. The penalties are graduated in severity based on whether an employee has no previous record of misconduct, has a single previous incident of documented misconduct, has two previous incidents of documented misconduct, etc. More serious types of misconduct have a more serious suggested penalty or range of penalties for a first offense than less serious types.

A Table of Penalties, as stated previously, contains a suggested range of penalties. It is a guide to discipline, not a rigid standard. Deviations are allowable for a variety of reasons. For example, when an employee is being charged with multiple offenses at the same time, it may be appropriate to exceed the maximum suggested penalty for all of the individual offenses. Again, when an employee has repeatedly committed the same offense, even though the employee is being charged with the offense for the first time, it may be appropriate to exceed the maximum suggested penalty. When the offense the employee committed is especially serious, compared to normal degree of the stated offense, there may be a basis for exceeding the maximum suggested penalty. On the other hand, there may be occasions when it may be appropriate to assess a penalty below the minimum suggested for the particular offense. In either event, when assessing a penalty outside the suggested range, there should be a reasonable explanation to distinguish why the penalty is outside the norm, a reason that can be explained to third parties in the event of a review.

J. Behavioral Offenses for Which Progressive Discipline is Appropriate

K. Offenses Warranting Punitive Discipline

L. Penalties Applying to Civilian Marine Personnel (Excluding Harbor Craft Employees)

A. BEHAVIORAL OFFENSES FOR WHICH PROGRESSIVE DISCIPLINE IS APPROPRIATE					
OFFENSE	NATURE OF OFFENSE	FIRST OFFENSE	SECOND OFFENSE	THIRD OFFENSE	REMARKS
1. Insubordination	Refusal to obey orders, defiance of authority.	Written reprimand to removal	5 day suspension to removal	Removal	
2. Fighting/ Creating a Disturbance*	a. Creating a disturbance resulting in an adverse effect on morale, production, or maintenance of proper discipline.	Written reprimand to 5 day suspension	5 to 10 day suspension	10 day suspension to removal	*Penalty may be exceeded if work is severely disrupted.
	b. Threatening or attempting to inflict bodily harm without bodily contact.	Written reprimand to 14 day suspension	14 day suspension to removal	30 day suspension to removal	*Penalty may be exceeded based on such factors as type of threat, provocation, extent of injuries, whether actions were defensive or aggressive in nature, or whether actions were directed at a supervisor.
	c. Hitting, pushing or other acts against another without causing injury.	Written reprimand to 30 day suspension	30 day suspension to removal	Removal	
	d. Hitting, pushing or other acts against another causing injury.	Written reprimand to removal	Removal		
3. Sleeping on duty	a. Where safety of personnel or property is not endangered.	Written reprimand to 1 day suspension	1 to 5 day suspension	5 day suspension to removal	
	b. Where safety of personnel or property is endangered.	1 day suspension to removal	Removal		

4. Loafing; delay in carrying out instructions	a. Idleness or failure to work on assigned duties.	Written reprimand to 3 day suspension	1-5 day suspension	5 day suspension to removal	
	b. Delay in carrying out or failure to carry out instructions within the time required.	Written reprimand to 3 day suspension	1-5 day suspension	5 day suspension to removal	
5. Attendance related offenses	a. Any absence from the regularly scheduled tour of duty which has not been authorized and/or for which pay must be denied (AWOL) or any absence from management directed additional hours of duty (Unauthorized Absence). Includes leaving the work site without permission	Written reprimand to 5 day suspension	1-14 day suspension	5 day suspension to removal	Penalty depends on length of absences. Removal may be appropriate for 1st or 2nd offenses if the absence is prolonged
	b. Failure to follow established leave procedures	Written reprimand to 5 day suspension	1-5 day suspension	5 day suspension to removal	
	c. Unexcused tardiness	Written reprimand to 1 day suspension	1 to 3 day suspension	1 to 5 day suspension. Habitual tardiness warrants removal	Includes delay in reporting at the scheduled starting time, returning from lunch or break periods, and returning after leaving work station on official business. Penalty depends on length and frequency of tardiness.
6. Unauthorized use of alcohol, drugs or controlled substances	a. Unauthorized possession or transfer of alcoholic beverages while on government premises or in a duty status.	Written reprimand to 5 day suspension	5-14 day suspension	14 day suspension to removal	Penalty may be exceeded when aggravating circumstance are present. See AR 600-85.
	b. Unauthorized use of alcoholic beverages while on government premises or in a duty status.	Written reprimand to 14 day suspension	14-30 day suspension	30 day suspension to removal	
	c. Reporting to work or being on duty while under the influence of alcohol, a drug or a controlled substance to a degree which would interfere with proper performance of duty, would be a menace to safety, or would be prejudicial to the maintenance of discipline. See para. 13 for other drug related offenses.	Written reprimand to 30 day suspension. Removal may be warranted if the safety of personnel or property is endangered.	14 day suspension to removal	Removal	
7. Discourtesy	a. Discourtesy, e.g., rude, unmannerly, impolite acts or remarks (non-discriminatory).	Written reprimand to 1 day suspension	1 to 5 day suspension	3-10 day suspension	Penalty for fourth offense within 1 year may be 14 day suspension to removal. Penalty may be exceeded if discourtesy or similar conduct was directed to a supervisor.
	b. Use of abusive or offensive language, gestures, or similar conduct (non-discriminatory)	Written reprimand to 10 day suspension	5 day suspension to removal	30 day suspension to removal	

8. Gambling	a. Participating in an unauthorized gambling activity while on Government premises or in a duty status.	Written reprimand to 1 day suspension	1-5 day suspension	5-30 day suspension	See AR 600-50
	b. Operating, assisting or promoting an unauthorized gambling activity while on Government premises or in a duty status or while others involved are in a duty status.	14 day suspension to removal	Removal		
9. Indebtedness	Failure to honor valid debts where agency mission or employee performance are affected.	Written reprimand	Written reprimand to 1 day suspension	Written reprimand to 5 day suspension	See AR 690-700, chap. 735, app E. There must be a clear nexus between efficiency of the service and the debt complaint.

B. OFFENSES WARRANTING PUNITIVE DISCIPLINE

OFFENSE	NATURE OF OFFENSE	FIRST OFFENSE	SECOND OFFENSE	THIRD OFFENSE	REMARKS
10. False Statements	a. False statements, misrepresentation, or fraud in entitlements, includes falsifying information on a time card, leave form, travel voucher, or other document pertaining to entitlements.	Written reprimand to removal	30 day suspension to removal	Removal	See para. 2-1. Removal is warranted for a first offense.
	b. False statements or misrepresentations on an SF 171, or other documents pertaining to qualifications, or on any official record not otherwise enumerated.	Written reprimand to removal	14 day suspension to removal	30 day suspension to removal	See para. 2-1. Removal is warranted when selection was based on falsified SF 171 where falsification was intentional (i.e., not an omission or where intent can be proven), or where the employee occupies a fiduciary position.
	c. Knowingly making false or malicious statements against co-workers, supervisors, subordinates, or government officials with the effect of harming or destroying the reputation, authority, or official standing of that individual or an organization.	Written reprimand to removal	Removal		
	d. Deliberate misrepresentation, exaggeration, concealment, withholding of a material fact. Includes perjury, making false sworn statements, and lying to a supervisor.	Written reprimand to removal	5 day suspension to removal	10 day suspension to removal	

11. Stealing	Stealing, actual or attempted, unauthorized possession of government property or property of others, or collusion with others to commit such acts.	14 day suspension to removal	Removal		See para. 2-1. Penalty depends on such factors as the value or the property or amounts of employee time involved, and the nature of the position held by the offending employee which may dictate a higher standard of conduct.
12. Misuse or abuse of Government Property	a. Using Government property or Federal employees in a duty status for other than official purposes.	Written reprimand to removal	1 day suspension to removal	14 day suspension to removal	See AR 600-50. Penalty depends on such factors as the value of the property or amounts of employee time involved, and the nature of the position held by the offending employee which may dictate a higher standard of conduct.
	b. Loss of or damage to government property, records or information when an employee is entrusted in safeguarding Government property as an absolute requirement of the job (e.g., cashier, warehouse worker, property book officer)	Written reprimand to 14 day suspension	Written reprimand to removal	14 day suspension to removal	
	c. Willfully using or authorizing the use of a government passenger motor vehicle or aircraft for other than official purposes.	30 day suspension to removal	Removal		See 31 USC 1349. Penalty cannot be mitigated to less than 30 days.
	d. Misuse of Government credentials	Written reprimand to removal	5 day suspension to removal	14 day suspension to removal	
	e. Intentionally mutilating or destroying a public record.	Removal			18 USC 2071

13. Unauthorized use or possession of a controlled substance	a. Introduction of a controlled substance to a work area or government installation for personal use	3 day suspension to removal	Removal		
	b. Introduction of a controlled substance to a work area or government installation in amounts sufficient for distribution or distribution of a controlled substance on a government installation	Removal			
14. Failure to observe written regulations, orders, rules, or procedures	a. Violation of administrative rules or regulations where safety to persons or property is not endangered.	Written reprimand to 1 day suspension	1-14 day suspension	5 day suspension to removal	
	b. Violation of administrative rules or regulations where safety to persons or property is endangered	Written reprimand to removal	30 day suspension to removal	Removal	
	c. Violations of official security regulations. Action against National Security				
	(1) Where restricted information is not compromised and breach is unintentional	written reprimand to 5 day suspension	1-14 day suspension	5 day suspension to removal	See AR 604-5 and 5 USC 7532
	(2) Where restricted information is compromised and breach is unintentional	Written reprimand to removal	30 day suspension to removal	Removal	
	(3) Deliberate violation	30 day suspension to removal	Removal		
15. Discrimination because of race, color, religion, age, sex, national origin, political affiliation or handicap, or marital status	Prohibited discriminatory practice in any aspect of employment (e.g., employment, appraisal, development, advancement or treatment of employees). Includes failure to prevent or curtail discrimination of a subordinate when the supervisor knew or should have known of the discrimination.	Written reprimand to Removal			Appropriate penalty depends on the facts in a given case weighed against DA policy that discrimination is prohibited.

16. Sexual Harassment. Influencing, offering to influence, or threatening the career, pay, job, or work assignments of another person in exchange for sexual favors OR deliberate or repeated offensive comments, gestures or physical contact of a sexual nature.	a. Involving a subordinate	1 day suspension to removal	10 day suspension to removal	30 day suspension to removal	Appropriate penalty depends on the fact situation in a given case weighed against DA policy that sexual harassment will not be tolerated. Where conduct created a hostile or offensive work environment, removal is warranted for a first offense.
	b. Not involving a subordinate	Written reprimand to 30 day suspension	5 day suspension to removal	10 day suspension to removal	
17. Constitutional Violation	Violation of employee's constitutional rights (i.e., freedom of speech/association/religion.)	Written reprimand to removal	5 day suspension to removal	30 day suspension to removal	
18. Conduct Unbecoming a Federal Employee	a. Immoral, indecent, or disgraceful conduct	1 day suspension to removal	Removal		Includes off-duty conduct if nexus is established.
	b. Solicitation of or accepting anything of monetary value from person who is seeking contracts or other business or financial gain	10 day suspension to removal	Removal		
19. Refusal to testify; interference or obstruction	a. Refusal to testify or cooperate in a properly authorized inquiry or investigation	1 day suspension to removal	5 day suspension to removal	Removal	Witness shall be assured freedom from restraint interference, coercion, discrimination, or reprisal in their testimony.
	b. Interference with attempting to influence, or attempting to alter testimony of witnesses or participants.	5 day suspension to removal	10 day suspension to removal	Removal	
	c. Attempting to impede investigation or to influence investigating officials.	10 day suspension to removal	30 day suspension to removal	Removal	
20. Political Activity	a. Violation of prohibition against soliciting political contributions.	Removal			5 USC 7323, 7324 and 7325
	b. Violation of prohibition against campaigning or influencing elections.	30 day suspension to removal	Removal		
21. Misappropriation	a. Directing, expecting or rendering services not covered by appropriations	Removal			5 USC 3103
	b. Failure to deposit into the Treasury money accruing from lapsed salaries or from unused appropriations from salaries.	Removal			5 USC 5501

22. Job Actions	Participating in or promoting a strike, work stoppage, slow down, sick out or other job actions.	Removal			
23. Reprisal	a. Intentional interference with an employee's exercise of, or reprisal against an employee for exercising a right to grieve, appeal or file a complaint through established procedures.	Written reprimand to removal	5 day suspension to removal	30 day suspension to removal	
	b. Reprisal against an employee for providing information to an Inspector General, MSPB Office of Special Counsel, EEOC or USACARA investigator, or for testifying in an official proceeding.	Written reprimand to removal	5 day suspension to removal	30 day suspension to removal	
	c. Intentional interference with an employee's exercise of, or reprisal against an employee for exercising a right provided under 5 USC 7101 <u>et seq</u> (governing Federal Labor-Management Relations).	Written reprimand to removal	5 day suspension to removal	30 day suspension to removal	
	d. Finding by MSPB of refusal to comply with MSPB order or finding of intentional violation of statute causing issuance of a special counsel complaint.	Written reprimand to removal	Removal		5 USC 1206(g)(1) and 1207(b)

C. PENALTIES APPLYING TO CIVILIAN MARINE PERSONNEL (EXCLUDING HARBOR CRAFT EMPLOYEES)

In addition to the penalties listed above that apply to Army employees in general, there are certain offenses for which, under express provisions of law or regulation, civilian marine employees may be punished by removal or even by fine or imprisonment.

OFFENSE	FIRST OFFENSE	SECOND OFFENSE	THIRD OFFENSE	REMARKS
24. Desertion	Removal (mandatory)			Employee forfeits all pay and allowances due from the voyage.
25. Missing sailing of the ship.	Written reprimand to removal	10 day suspension to removal	30 day suspension to removal	
26. Willful disobedience to lawful command at sea.	Written reprimand to removal	10 day suspension to removal	30 day suspension to removal	The offender may be confined until such disobedience shall cease. Pay does not accrue during period of confinement.
27. Assaulting any Master, Mate, Pilot, Engineer or other officer.	Written reprimand to removal	Removal		Upon conviction, offender may be imprisoned not more that 2 years (46 USC 11501).
28. Willfully damaging the ship or her equipment, or willfully embezzling or damaging any of her stores or cargo.	Loss of pay equal to the loss sustained and reprimand to removal.	Loss of pay equal to the loss sustained and 30 day suspension to removal.	Loss of pay equal to the loss sustained and removal.	See 46 USC 11501

29. Smuggling	Removal (mandatory)			For any act of smuggling for which the offender is convicted and whereby loss or damage is occasioned to the Master or the Army such a sum as sufficient to reimburse the Master of the Army may be retained from offender's wages in satisfaction or on account of such liability.
30. Introducing, selling, possessing, or using intoxicants aboard ship.	5 day suspension to removal.	10 day suspension to removal.	30 day suspension to removal.	
31. Unauthorized use or possession of a controlled substance				
a. Introduction of a controlled substance aboard ship for personal use.	5 day suspension to removal.	Removal.		
b. Introduction of a controlled substance aboard ship in amounts sufficient for distribution, or distribution of a controlled substance aboard ship.	Removal.			

**TITLE 5 OF THE UNITED STATES CODE
GOVERNMENT ORGANIZATION AND EMPLOYEES
PART III--EMPLOYEES
SUBPART F--LABOR-MANAGEMENT AND
EMPLOYEE RELATIONS
CHAPTER 71 LABOR-MANAGEMENT RELATIONS**

**SUBCHAPTER I--
GENERAL PROVISIONS**

Sec.

- 7101. Findings and purpose.
- 7102. Employees' rights.
- 7103. Definitions; application.
- 7104. Federal Labor Relations Authority.
- 7105. Powers and duties of the Authority.
- 7106. Management rights.

**SUBCHAPTER II--
RIGHTS AND DUTIES OF AGENCIES AND
LABOR ORGANIZATIONS**

- 7111. Exclusive recognition of labor organizations.
- 7112. Determination of appropriate units for labor organization representation.
- 7113. National consultation rights.
- 7114. Representation rights and duties.
- 7115. Allotments to representatives.
- 7116. Unfair labor practices.
- 7117. Duty to bargain in good faith; compelling need; duty to consult.
- 7118. Prevention of unfair labor practices.
- 7119. Negotiation impasses; Federal Service Impasses Panel.
- 7120. Standards of conduct for labor organizations.

**SUBCHAPTER III--
GRIEVANCES, APPEALS, AND REVIEW**

- 7121. Grievance procedures.
- 7122. Exceptions to arbitral awards.
- 7123. Judicial review; enforcement.

**SUBCHAPTER IV--
ADMINISTRATIVE AND OTHER PROVISIONS**

- 7131. Official time.
- 7132. Subpenas.
- 7133. Compilation and publication of data.
- 7134. Regulations.

7135. Continuation of existing laws, recognitions, agreements, and procedures.

SUBCHAPTER I – GENERAL PROVISIONS

§ 7101. Findings and purpose

(a) The Congress finds that--

- (1) experience in both private and public employment indicates that the statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them--
 - (A) safeguards the public interest,
 - (B) contributes to the effective conduct of public business, and
 - (C) facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment; and
- (2) the public interest demands the highest standards of employee performance and the continued development and implementation of modern and progressive work practices to facilitate and improve employee performance and the efficient accomplishment of the operations of the Government.

Therefore, labor organizations and collective bargaining in the civil service are in the public interest.

(b) It is the purpose of this chapter to prescribe certain rights and obligations of the employees of the Federal Government and to establish procedures which are designed to meet the special requirements and needs of the Government. The provisions of this chapter should be interpreted in a manner consistent with the requirement of an effective and efficient Government.

§ 7102. Employees' rights

Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided under this chapter, such right includes the right--

- (1) to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities, and
- (2) to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter.

§ 7103. Definitions; application

(a) For the purpose of this chapter--

- (1) "person" means an individual, labor organization, or agency;
- (2) "employee" means an individual--
 - (A) employed in an agency; or
 - (B) whose employment in an agency has ceased because of any unfair labor practice under section 7116 of this title and who has not obtained any other regular and substantially equivalent employment, as determined under regulations prescribed by the Federal Labor Relations Authority;

but does not include--

- (i) an alien or noncitizen of the United States who occupies a position outside the United States;
 - (ii) a member of the uniformed services;
 - (iii) a supervisor or a management official;
 - (iv) an officer or employee in the Foreign Service of the United States employed in the Department of State, the International Communication Agency, the Agency for International Development, the Department of Agriculture, or the Department of Commerce; or
 - (v) any person who participates in a strike in violation of section 7311 of this title;
- (3) "agency" means an Executive agency (including a nonappropriated fund instrumentality described in section 2105(c) of this title and the Veterans' Canteen Service, Department of Veterans Affairs), the Library of Congress, the Government Printing Office, and the Smithsonian Institution, but does not include--
 - (A) the General Accounting Office;
 - (B) the Federal Bureau of Investigation;
 - (C) the Central Intelligence Agency;
 - (D) the National Security Agency;
 - (E) the Tennessee Valley Authority;
 - (F) the Federal Labor Relations Authority;
 - (G) the Federal Service Impasses Panel; or
 - (H) the United States Secret Service and the United States Secret Service Uniformed Division.
 - (4) "labor organization" means an organization composed in whole or in part of employees, in which employees participate and pay dues, and which has as a purpose the dealing

with an agency concerning grievances and conditions of employment, but does not include--

- (A) an organization which, by its constitution, bylaws, tacit agreement among its members, or otherwise, denies membership because of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition;
 - (B) an organization which advocates the overthrow of the constitutional form of government of the United States;
 - (C) an organization sponsored by an agency; or
 - (D) an organization which participates in the conduct of a strike against the Government or any agency thereof or imposes a duty or obligation to conduct, assist, or participate in such a strike;
- (5) "dues" means dues, fees, and assessments;
- (6) "Authority" means the Federal Labor Relations Authority described in section 7104(a) of this title;
- (7) "Panel" means the Federal Service Impasses Panel described in section 7119(c) of this title;
- (8) "collective bargaining agreement" means an agreement entered into as a result of collective bargaining pursuant to the provisions of this chapter;
- (9) "grievance" means any complaint--
- (A) by any employee concerning any matter relating to the employment of the employee;
 - (B) by any labor organization concerning any matter relating to the employment of any employee; or
 - (C) by any employee, labor organization, or agency concerning--
 - (i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or
 - (ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment;
- (10) "supervisor" means an individual employed by an agency having authority in the interest of the agency to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment, except that, with respect to any unit which includes firefighters or nurses, the term "supervisor" includes only those individuals who devote a preponderance of their employment time to exercising such authority;
- (11) "management official" means an individual employed by an agency in a position the duties and responsibilities of which require or authorize the individual to formulate, determine, or influence the policies of the agency;

- (12) "collective bargaining" means the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached, but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession;
- (13) "confidential employee" means an employee who acts in a confidential capacity with respect to an individual who formulates or effectuates management policies in the field of labor-management relations;
- (14) "conditions of employment" means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters--
- (A) relating to political activities prohibited under subchapter III of chapter 73 of this title;
 - (B) relating to the classification of any position; or
 - (C) to the extent such matters are specifically provided for by Federal statute;
- (15) "professional employee" means--
- (A) an employee engaged in the performance of work--
 - (i) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital (as distinguished from knowledge acquired by a general academic education, or from an apprenticeship, or from training in the performance of routine mental, manual, mechanical, or physical activities);
 - (ii) requiring the consistent exercise of discretion and judgment in its performance;
 - (iii) which is predominantly intellectual and varied in character (as distinguished from routine mental, manual, mechanical, or physical work); and
 - (iv) which is of such character that the output produced or the result accomplished by such work cannot be standardized in relation to a given period of time; or
 - (B) an employee who has completed the courses of specialized intellectual instruction and study described in subparagraph (A)(i) of this paragraph and is performing related work under appropriate direction or guidance to qualify the employee as a professional employee described in subparagraph (A) of this paragraph;
- (16) "exclusive representative" means any labor organization which--
- (A) is certified as the exclusive representative of employees in an appropriate unit pursuant to section 7111 of this title; or
 - (B) was recognized by an agency immediately before the effective date of this chapter as the exclusive representative of employees in an appropriate unit--

- (i) on the basis of an election; or
- (ii) on any basis other than an election,

and continues to be so recognized in accordance with the provisions of this chapter;

(17) "firefighter" means any employee engaged in the performance of work directly connected with the control and extinguishment of fires or the maintenance and use firefighting apparatus and equipment; and

(18) "United States" means the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, the Trust Territory of the Pacific Islands, and any territory or possession of the United States.

(b) (1) The President may issue an order excluding any agency or subdivision thereof from coverage under this chapter if the President determines that--

(A) the agency or subdivision has as a primary function intelligence, counterintelligence, investigative, or national security work, and

(B) the provisions of this chapter cannot be applied to that agency or subdivision in a manner consistent with national security requirements and considerations.

(2) The President may issue an order suspending any provision of this chapter with respect to any agency, installation, or activity located outside the 50 States and the District of Columbia, if the President determines that the suspension is necessary in the interest of national security.

§ 7104. Federal Labor Relations Authority

(a) The Federal Labor Relations Authority is composed of three members, not more than 2 of whom may be adherents of the same political party. No member shall engage in any other business or employment or hold another office or position in the Government of the United States except as otherwise provided by law.

(b) Members of the Authority shall be appointed by the President by and with the advice and consent of the Senate, and may be removed by the President only upon notice and hearing and only for inefficiency, neglect of duty, or malfeasance in office. The President shall designate one member to serve as Chairman of the Authority. The Chairman is the chief executive and administrative officer of the Authority.

(c) A member of the Authority shall be appointed for a term of 5 years. An individual chosen to fill a vacancy shall be appointed for the unexpired term of the member replaced. The term of any member shall not expire before the earlier of--

(1) the date on which the member's successor takes office, or

- (2) the last day of the Congress beginning after the date on which the member's term of office would (but for this paragraph) expire.
- (d) A vacancy in the Authority shall not impair the right of the remaining members to exercise all of the powers of the Authority.
- (e) The Authority shall make an annual report to the President for transmittal to the Congress which shall include information as to the cases it has heard and decisions it has rendered.
- (f) (1) The General Counsel of the Authority shall be appointed by the President, by and with the advice and consent of the Senate, for a term of 5 years. The General Counsel may be removed at any time by the President. The General Counsel shall hold no other office or position in the Government of the United States except as provided by law.
- (2) The General Counsel may--
 - (A) investigate alleged unfair labor practices under this chapter,
 - (B) file and prosecute complaints under this chapter, and
 - (C) exercise such other powers of the Authority as the Authority may prescribe.
- (3) The General Counsel shall have direct authority over, and responsibility for, all employees in the office of General Counsel, including employees of the General Counsel in the regional offices of the Authority.

§ 7105. Powers and duties of the Authority

- (a) (1) The Authority shall provide leadership in establishing policies and guidance relating to matters under this chapter, and, except as otherwise provided, shall be responsible for carrying out the purpose of this chapter.
- (2) The Authority shall, to the extent provided in this chapter and in accordance with regulations prescribed by the Authority--
 - (A) determine the appropriateness of units for labor organization representation under section 7112 of this title;
 - (B) supervise or conduct elections to determine whether a labor organization has been selected as an exclusive representative by a majority of the employees in an appropriate unit and otherwise administer the provisions of section 7111 of this title relating to the according of exclusive recognition to labor organizations;
 - (C) prescribe criteria and resolve issues relating to the granting of national consultation rights under section 7113 of this title;
 - (D) prescribe criteria and resolve issues relating to determining compelling need for agency rules or regulations under section 7117(b) of this title;

- (E) resolve issues relating to the duty to bargain in good faith under section 7117(c) of this title;
 - (F) prescribe criteria relating to the granting of consultation rights with respect to conditions of employment under section 7117(d) of this title;
 - (G) conduct hearings and resolve complaints of unfair labor practices under section 7118 of this title;
 - (H) resolve exceptions to arbitrator's awards under section 7122 of this title; and
 - (I) take such other actions as are necessary and appropriate to effectively administer the provisions of this chapter.
- (b) The Authority shall adopt an official seal which shall be judicially noticed.
- (c) The principal office of the Authority shall be in or about the District of Columbia, but the Authority may meet and exercise any or all of its powers at any time or place. Except as otherwise expressly provided by law, the Authority may, by one or more of its members or by such agents as it may designate, make any appropriate inquiry necessary to carry out its duties wherever persons subject to this chapter are located. Any member who participates in the inquiry shall not be disqualified from later participating in a decision of the Authority in any case relating to the inquiry.
- (d) The Authority shall appoint an Executive Director and such regional directors, administrative law judges under section 3105 of this title, and other individuals as it may from time to time find necessary for the proper performance of its functions. The Authority may delegate to officers and employees appointed under this subsection authority to perform such duties and make such expenditures as may be necessary.
- (e) (1) The Authority may delegate to any regional director its authority under this chapter--
- (A) to determine whether a group of employees is an appropriate unit;
 - (B) to conduct investigations and to provide for hearings;
 - (C) to determine whether a question of representation exists and to direct an election; and
 - (D) to supervise or conduct secret ballot elections and certify the results thereof.
- (2) The Authority may delegate to any administrative law judge appointed under subsection (d) of this section its authority under section 7118 of this title to determine whether any person has engaged in or is engaging in an unfair labor practice.
- (f) If the Authority delegates any authority to any regional director or administrative law judge to take any action pursuant to subsection (e) of this section, the Authority may, upon application by any interested person filed within 60 days after the date of the action, review such action, but the review shall not, unless specifically ordered by the Authority, operate as a stay of action. The Authority may affirm, modify, or reverse any action reviewed under this subsection. If the Authority does not undertake to grant review of the action under this subsection within 60 days after the later of--

- (1) the date of the action; or
- (2) the date of the filing of any application under this subsection for review of the action;

the action shall become the action of the Authority at the end of such 60-day period.

(g) In order to carry out its functions under this chapter, the Authority may--

- (1) hold hearings;
- (2) administer oaths, take the testimony or deposition of any person under oath, and issue subpoenas as provided in section 7132 of this title; and
- (3) may require an agency or a labor organization to cease and desist from violations of this chapter and require it to take any remedial action it considers appropriate to carry out the policies of this chapter.

(h) Except as provided in section 518 of title 28, relating to litigation before the Supreme Court, attorneys designated by the Authority may appear for the Authority and represent the Authority in any civil action brought in connection with any function carried out by the Authority pursuant to this title or as otherwise authorized by law.

(i) In the exercise of the functions of the Authority under this title, the Authority may request from the Director of the Office of Personnel Management an advisory opinion concerning the proper interpretation of rules, regulations, or policy directives issued by the Office of Personnel Management in connection with any matter before the Authority.

§ 7106. Management rights

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency--

- (1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and
- (2) in accordance with applicable laws--
 - (A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;
 - (B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;
 - (C) with respect to filling positions, to make selections for appointments from--
 - (i) among properly ranked and certified candidates for promotion; or
 - (ii) any other appropriate source; and

(D) to take whatever actions may be necessary to carry out the agency mission during emergencies.

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating--

- (1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;
- (2) procedures which management officials of the agency will observe in exercising any authority under this section; or
- (3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

SUBCHAPTER II – RIGHTS AND DUTIES OF AGENCIES AND LABOR ORGANIZATIONS

§ 7111. Exclusive recognition of labor organizations

(a) An agency shall accord exclusive recognition to a labor organization if the organization has been selected as the representative, in a secret ballot election, by a majority of the employees in an appropriate unit who cast valid ballots in the election.

(b) If a petition is filed with the Authority--

(1) by any person alleging--

(A) in the case of an appropriate unit for which there is no exclusive representative, that 30 percent of the employees in the appropriate unit wish to be represented for the purpose of collective bargaining by an exclusive representative, or

(B) in the case of an appropriate unit for which there is an exclusive representative, that 30 percent of the employees in the unit allege that the exclusive representative is no longer the representative of the majority of the employees in the unit; or

(2) by any person seeking clarification of, or an amendment to, a certification then in effect or a matter relating to representation;

the Authority shall investigate the petition, and if it has reasonable cause to believe that a question of representation exists, it shall provide an opportunity for a hearing (for which a transcript shall be kept) after a reasonable notice. If the Authority finds on the record of the hearing that a question of representation exists, the Authority shall supervise or conduct an

election on the question by secret ballot and shall certify the results thereof. An election under this subsection shall not be conducted in any appropriate unit or in any subdivision thereof within which, in the preceding 12 calendar months, a valid election under this subsection has been held.

(c) A labor organization which--

- (1) has been designated by at least 10 percent of the employees in the unit specified in any petition filed pursuant to subsection (b) of this section;
- (2) has submitted a valid copy of a current or recently expired collective bargaining agreement for the unit; or
- (3) has submitted other evidence that it is the exclusive representative of the employees involved;

may intervene with respect to a petition filed pursuant to subsection (b) of this section and shall be placed on the ballot of any election under such subsection (b) with respect to the petition.

(d) The Authority shall determine who is eligible to vote in any election under this section and shall establish rules governing any such election, which shall include rules allowing employees eligible to vote the opportunity to choose--

- (1) from labor organizations on the ballot, that labor organization which the employees wish to have represent them; or
- (2) not to be represented by a labor organization.

In any election in which no choice on the ballot receives a majority of the votes cast, a runoff election shall be conducted between the two choices receiving the highest number of votes. A labor organization which receives the majority of the votes cast in an election shall be certified by the Authority as the exclusive representative.

(e) A labor organization seeking exclusive recognition shall submit to the Authority and the agency involved a roster of its officers and representatives, a copy of its constitution and bylaws, and a statement of its objectives.

(f) Exclusive recognition shall not be accorded to a labor organization--

- (1) if the Authority determines that the labor organization is subject to corrupt influences or influences opposed to democratic principles;
- (2) in the case of a petition filed pursuant to subsection (b)(1)(A) of this section, if there is not credible evidence that at least 30 percent of the employees in the unit specified in the petition wish to be represented for the purpose of collective bargaining by the labor organization seeking exclusive recognition;
- (3) if there is then in effect a lawful written collective bargaining agreement between the agency involved and an exclusive representative (other than the labor organization

seeking exclusive recognition) covering any employees included in the unit specified in the petition, unless--

(A) the collective bargaining agreement has been in effect for more than 3 years, or

(B) the petition for exclusive recognition is filed not more than 105 days and not less than 60 days before the expiration date of the collective bargaining agreement; or

(4) if the Authority has, within the previous 12 calendar months, conducted a secret ballot election for the unit described in any petition under this section and in such election a majority of the employees voting chose a labor organization for certification as the unit's exclusive representative.

(g) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules or decisions of the Authority.

§ 7112. Determination of appropriate units for labor organization representation

(a) The Authority shall determine the appropriateness of any unit. The Authority shall determine in each case whether, in order to ensure employees the fullest freedom in exercising the rights guaranteed under this chapter, the appropriate unit should be established on an agency, plant, installation, functional, or other basis and shall determine any unit to be an appropriate unit only if the determination will ensure a clear and identifiable community of interest among the employees in the unit and will promote effective dealings with, and efficiency of the operations of the agency involved.

(b) A unit shall not be determined to be appropriate under this section solely on the basis of the extent to which employees in the proposed unit have organized, nor shall a unit be determined to be appropriate if it includes--

(1) except as provided under section 7135(a)(2) of this title, any management official or supervisor;

(2) a confidential employee;

(3) an employee engaged in personnel work in other than a purely clerical capacity;

(4) an employee engaged in administering the provisions of this chapter;

(5) both professional employees and other employees, unless a majority of the professional employees vote for inclusion in the unit;

(6) any employee engaged in intelligence, counterintelligence, investigative, or security work which directly affects national security; or

(7) any employee primarily engaged in investigation or audit functions relating to the work of individuals employed by an agency whose duties directly affect the internal security of

the agency, but only if the functions are undertaken to ensure that the duties are discharged honestly and with integrity.

- (c) Any employee who is engaged in administering any provision of law relating to labor-management relations may not be represented by a labor organization--
 - (1) which represents other individuals to whom such provision applies; or
 - (2) which is affiliated directly or indirectly with an organization which represents other individuals to whom such provision applies.
- (d) Two or more units which are in an agency and for which a labor organization is the exclusive representative may, upon petition by the agency or labor organization, be consolidated with or without an election into a single larger unit if the Authority considers the larger unit to be appropriate. The Authority shall certify the labor organization as the exclusive representative of the new larger unit.

§ 7113. National consultation rights

- (a) If, in connection with any agency, no labor organization has been accorded exclusive recognition on an agency basis, a labor organization which is the exclusive representative of a substantial number of the employees of the agency, as determined in accordance with criteria prescribed by the Authority, shall be granted national consultation rights by the agency. National consultation rights shall terminate when the labor organization no longer meets the criteria prescribed by the Authority. Any issue relating to any labor organization's eligibility for, or continuation of, national consultation rights shall be subject to determination by the Authority.
- (b) (1) Any labor organization having national consultation rights in connection with any agency under subsection (a) of this section shall--
 - (A) be informed of any substantive change in conditions of employment proposed by the agency, and
 - (B) be permitted reasonable time to present its views and recommendations regarding the changes.
- (2) If any views or recommendations are presented under paragraph (1) of this subsection to an agency by any labor organization--
 - (A) the agency shall consider the views or recommendations before taking final action on any matter with respect to which the views or recommendations are presented; and
 - (B) the agency shall provide the labor organization a written statement of the reasons for taking the final action.
- (c) Nothing in this section shall be construed to limit the right of any agency or exclusive representative to engage in collective bargaining.

§ 7114. Representation rights and duties

- (a) (1) A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.
 - (2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at--
 - (A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment; or
 - (B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if--
 - (i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and
 - (ii) the employee requests representation.
 - (3) Each agency shall annually inform its employees of their rights under paragraph (2)(B) of this subsection.
 - (4) Any agency and any exclusive representative in any appropriate unit in the agency, through appropriate representatives, shall meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement. In addition, the agency and the exclusive representative may determine appropriate techniques, consistent with the provisions of section 7119 of this title, to assist in any negotiation.
 - (5) The rights of an exclusive representative under the provisions of this subsection shall not be construed to preclude an employee from--
 - (A) being represented by an attorney or other representative, other than the exclusive representative, of the employee's own choosing in any grievance or appeal action; or
 - (B) exercising grievance or appellate rights established by law, rule, or regulation;
- except in the case of grievance or appeal procedures negotiated under this chapter.
- (b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation--
 - (1) to approach the negotiations with a sincere resolve to reach a collective bargaining agreement;

- (2) to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment;
 - (3) to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays;
 - (4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data--
 - (A) which is normally maintained by the agency in the regular course of business;
 - (B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and
 - (C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining; and
 - (5) if agreement is reached, to execute on the request of any party to the negotiation a written document embodying the agreed terms, and to take such steps as are necessary to implement such agreement.
- (c) (1) An agreement between any agency and an exclusive representative shall be subject to approval by the head of the agency.
- (2) The head of the agency shall approve the agreement within 30 days from the date the agreement is executed if the agreement is in accordance with the provisions of this chapter and any other applicable law, rule, or regulation (unless the agency has granted an exception to the provision).
 - (3) If the head of the agency does not approve or disapprove the agreement within the 30-day period, the agreement shall take effect and shall be binding on the agency and the exclusive representative subject to the provisions of this chapter and any other applicable law, rule, or regulation.
 - (4) A local agreement subject to a national or other controlling agreement at a higher level shall be approved under the procedures of the controlling agreement or, if none, under regulations prescribed by the agency.

§ 7115. Allotments to representatives

- (a) If an agency has received from an employee in an appropriate unit a written assignment which authorizes the agency to deduct from the pay of the employee amounts for the payment of regular and periodic dues of the exclusive representative of the unit, the agency shall honor the assignment and make an appropriate allotment pursuant to the assignment. Any such allotment shall be made at no cost to the exclusive representative or the employee. Except as provided under subsection (b) of this section, any such assignment may not be revoked for a period of 1 year.

- (b) An allotment under subsection (a) of this section for the deduction of dues with respect to any employee shall terminate when--
- (1) the agreement between the agency and the exclusive representative involved ceases to be applicable to the employee; or
 - (2) the employee is suspended or expelled from membership in the exclusive representative.
- (c) (1) Subject to paragraph (2) of this subsection, if a petition has been filed with the Authority by a labor organization alleging that 10 percent of the employees in an appropriate unit in an agency have membership in the labor organization, the Authority shall investigate the petition to determine its validity. Upon certification by the Authority of the validity of the petition, the agency shall have a duty to negotiate with the labor organization solely concerning the deduction of dues of the labor organization from the pay of the members of the labor organization who are employees in the unit and who make a voluntary allotment for such purpose.
- (2)(A) The provisions of paragraph (1) of this subsection shall not apply in the case of any appropriate unit for which there is an exclusive representative.
- (B) Any agreement under paragraph (1) of this subsection between a labor organization and an agency with respect to an appropriate unit shall be null and void upon the certification of an exclusive representative of the unit.

§ 7116. Unfair labor practices

- (a) For the purpose of this chapter, it shall be an unfair labor practice for an agency--
- (1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;
 - (2) to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment;
 - (3) to sponsor, control, or otherwise assist any labor organization, other than to furnish, upon request, customary and routine services and facilities if the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status;
 - (4) to discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, or petition, or has given any information or testimony under this chapter;
 - (5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;
 - (6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;
 - (7) to enforce any rule or regulation (other than a rule or regulation implementing section 2302 of this title) which is in conflict with any applicable collective bargaining

agreement if the agreement was in effect before the date the rule or regulation was prescribed; or

(8) to otherwise fail or refuse to comply with any provision of this chapter.

(b) For the purpose of this chapter, it shall be an unfair labor practice for a labor organization--

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

(2) to cause or attempt to cause an agency to discriminate against any employee in the exercise by the employee of any right under this chapter;

(3) to coerce, discipline, fine, or attempt to coerce a member of the labor organization as punishment, reprisal, or for the purpose of hindering or impeding the member's work performance or productivity as an employee or the discharge of the member's duties as an employee;

(4) to discriminate against an employee with regard to the terms or conditions of membership in the labor organization on the basis of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition;

(5) to refuse to consult or negotiate in good faith with an agency as required by this chapter;

(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;

(7) (A) to call, or participate in, a strike, work stoppage, or slowdown, or picketing of an agency in a labor-management dispute if such picketing interferes with an agency's operations, or

(B) to condone any activity described in subparagraph (A) of this paragraph by failing to take action to prevent or stop such activity; or

(8) to otherwise fail or refuse to comply with any provision of this chapter.

Nothing in paragraph (7) of this subsection shall result in any informational picketing which does not interfere with an agency's operations being considered as an unfair labor practice.

(c) For the purpose of this chapter it shall be an unfair labor practice for an exclusive representative to deny membership to any employee in the appropriate unit represented by such exclusive representative except for failure--

(1) to meet reasonable occupational standards uniformly required for admission, or

(2) to tender dues uniformly required as a condition of acquiring and retaining membership.

This subsection does not preclude any labor organization from enforcing discipline in accordance with procedures under its constitution or bylaws to the extent consistent with the provisions of this chapter.

- (d) Issues which can properly be raised under an appeals procedure may not be raised as unfair labor practices prohibited under this section. Except for matters wherein, under section 7121(e) and (f) of this title, an employee has an option of using the negotiated grievance procedure or an appeals procedure, issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures.
- (e) The expression of any personal view, argument, opinion or the making of any statement which--
 - (1) publicizes the fact of a representational election and encourages employees to exercise their right to vote in such election,
 - (2) corrects the record with respect to any false or misleading statement made by any person, or
 - (3) informs employees of the Government's policy relating to labor-management relations and representation,

shall not, if the expression contains no threat or reprisal or force or promise of benefit or was not made under coercive conditions, (A) constitute an unfair labor practice under any provision of this chapter, or (B) constitute grounds for the setting aside of any election conducted under any provisions of this chapter.

§ 7117. Duty to bargain in good faith; compelling need; duty to consult

- (a) (1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.
- (2) The duty to bargain in good faith shall, to the extent not inconsistent with Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any agency rule or regulation referred to in paragraph (3) of this subsection only if the Authority has determined under subsection (b) of this section that no compelling need (as determined under regulations prescribed by the Authority) exists for the rule or regulation.
- (3) Paragraph (2) of the subsection applies to any rule or regulation issued by any agency or issued by any primary national subdivision of such agency, unless an exclusive representative represents an appropriate unit including not less than a majority of the employees in the issuing agency or primary national subdivision, as the case may be, to whom the rule or regulation is applicable.

- (b) (1) In any case of collective bargaining in which an exclusive representative alleges that no compelling need exists for any rule or regulation referred to in subsection (a)(3) of this section which is then in effect and which governs any matter at issue in such collective bargaining, the Authority shall determine under paragraph (2) of this subsection, in accordance with regulations prescribed by the Authority, whether such a compelling need exists.
 - (2) For the purpose of this section, a compelling need shall be determined not to exist for any rule or regulation only if--
 - (A) the agency, or primary national subdivision, as the case may be, which issued the rule or regulation informs the Authority in writing that a compelling need for the rule or regulation does not exist; or
 - (B) the Authority determines that a compelling need for a rule or regulation does not exist.
 - (3) A hearing may be held, in the discretion of the Authority, before a determination is made under this subsection. If a hearing is held, it shall be expedited to the extent practicable and shall not include the General Counsel as a party.
 - (4) The agency, or primary national subdivision, as the case may be, which issued the rule or regulation shall be a necessary party at any hearing under this subsection.
- (c) (1) Except in any case to which subsection (b) of this section applies, if an agency involved in collective bargaining with an exclusive representative alleges that the duty to bargain in good faith does not extend to any matter, the exclusive representative may appeal the allegation to the Authority in accordance with the provisions of this subsection.
 - (2) The exclusive representative may, on or before the 15th day after the date on which the agency first makes the allegation referred to in paragraph (1) of this subsection, institute an appeal under this subsection by--
 - (A) filing a petition with the Authority; and
 - (B) furnishing a copy of the petition to the head of the agency.
 - (3) On or before the 30th day after the date of the receipt by the head of the agency of the copy of the petition under paragraph (2)(B) of this subsection, the agency shall--
 - (A) file with the Authority a statement--
 - (i) withdrawing the allegation; or
 - (ii) setting forth in full its reasons supporting the allegation; and
 - (B) furnish a copy of such statement to the exclusive representative.
 - (4) On or before the 15th day after the date of the receipt by the exclusive representative of a copy of a statement under paragraph (3)(B) of this subsection, the exclusive representative shall file with the Authority its response to the statement.

- (5) A hearing may be held, in the discretion of the Authority, before a determination is made under this subsection. If a hearing is held, it shall not include the General Counsel as a party.
 - (6) The Authority shall expedite proceedings under this subsection to the extent practicable and shall issue to the exclusive representative and to the agency a written decision on the allegation and specific reasons therefore at the earliest practicable date.
- (d) (1) A labor organization which is the exclusive representative of a substantial number of employees, determined in accordance with criteria prescribed by the Authority, shall be granted consultation rights by any agency with respect to any Government-wide rule or regulation issued by the agency effecting any substantive change in any condition of employment. Such consultation rights shall terminate when the labor organization no longer meets the criteria prescribed by the Authority. Any issue relating to a labor organization's eligibility for, or continuation of, such consultation rights shall be subject to determination by the Authority.
- (2) A labor organization having consultation rights under paragraph (1) of this subsection shall--
- (A) be informed of any substantive change in conditions of employment proposed by the agency, and
 - (B) shall be permitted reasonable time to present its views and recommendations regarding the changes.
- (3) If any views or recommendations are presented under paragraph (2) of this subsection to an agency by any labor organization--
- (A) the agency shall consider the views or recommendations before taking final action on any matter with respect to which the views or recommendations are presented; and
 - (B) the agency shall provide the labor organization a written statement of the reasons for taking the final action.

§ 7118. Prevention of unfair labor practices

- (a) (1) If any agency or labor organization is charged by any person with having engaged in or engaging in an unfair labor practice, the General Counsel shall investigate the charge and may issue and cause to be served upon the agency or labor organization a complaint. In any case in which the General Counsel does not issue a complaint because the charge fails to state an unfair labor practice, the General Counsel shall provide the person making the charge a written statement of the reasons for not issuing a complaint.
- (2) Any complaint under paragraph (1) of this subsection shall contain a notice--
- (A) of the charge;
 - (B) that a hearing will be held before the Authority (or any member thereof or before an individual employed by the authority and designated for such purpose); and

(C) of the time and place fixed for the hearing.

(3) The labor organization or agency involved shall have the right to file an answer to the original and any amended complaint and to appear in person or otherwise and give testimony at the time and place fixed in the complaint for the hearing.

(4) (A) Except as provided in subparagraph (B) of this paragraph, no complaint shall be issued on any alleged unfair labor practice which occurred more than 6 months before the filing of the charge with the Authority.

(B) If the General Counsel determines that the person filing any charge was prevented from filing the charge during the 6-month period referred to in subparagraph (A) of this paragraph by reason of--

(i) any failure of the agency or labor organization against which the charge is made to perform a duty owed to the person, or

(ii) any concealment which prevented discovery of the alleged unfair labor practice during the 6- month period,

the General Counsel may issue a complaint based on the charge if the charge was filed during the 6-month period beginning on the day of the discovery by the person of the alleged unfair labor practice.

(5) The General Counsel may prescribe regulations providing for informal methods by which the alleged unfair labor practice may be resolved prior to the issuance of a complaint.

(6) The Authority (or any member thereof or any individual employed by the Authority and designated for such purpose) shall conduct a hearing on the complaint not earlier than 5 days after the date on which the complaint is served. In the discretion of the individual or individuals conducting the hearing, any person involved may be allowed to intervene in the hearing and to present testimony. Any such hearing shall, to the extent practicable, be conducted in accordance with the provisions of subchapter II of chapter 5 of this title, except that the parties shall not be bound by rules of evidence, whether statutory, common law, or adopted by a court. A transcript shall be kept of the hearing. After such a hearing the Authority, in its discretion, may upon notice receive further evidence or hear argument.

(7) If the Authority (or any member thereof or any individual employed by the Authority and designated for such purpose) determines after any hearing on a complaint under paragraph (5) of this subsection that the preponderance of the evidence received demonstrates that the agency or labor organization named in the complaint has engaged in or is engaging in an unfair labor practice, then the individual or individuals conducting the hearing shall state in writing their findings of fact and shall issue and cause to be served on the agency or labor organization an order--

(A) to cease and desist from any such unfair labor practice in which the agency or labor organization is engaged;

- (B) requiring the parties to renegotiate a collective bargaining agreement in accordance with the order of the Authority and requiring that the agreement, as amended, be given retroactive effect;
- (C) requiring reinstatement of an employee with backpay in accordance with section 5596 of this title; or
- (D) including any combination of the actions described in subparagraphs (A) through (C) of this paragraph or such other action as will carry out the purpose of this chapter.

If any such order requires reinstatement of any employee with backpay, backpay may be required of the agency (as provided in section 5596 of this title) or of the labor organization, as the case may be, which is found to have engaged in the unfair labor practice involved.

- (8) If the individual or individuals conducting the hearing determine that the preponderance of the evidence received fails to demonstrate that the agency or labor organization named in the complaint has engaged in or is engaging in an unfair labor practice, the individual or individuals shall state in writing their findings of fact and shall issue an order dismissing the complaint.
- (b) In connection with any matter before the Authority in any proceeding under this section, the Authority may request, in accordance with the provisions of section 7105(i) of this title, from the Director of the Office of Personnel Management an advisory opinion concerning the proper interpretation of rules, regulations, or other policy directives issued by the Office of Personnel Management.

§ 7119. Negotiation impasses; Federal Service Impasses Panel

- (a) The Federal Mediation and Conciliation Service shall provide services and assistance to agencies and exclusive representatives in the resolution of negotiation impasses. The Service shall determine under what circumstances and in what matter it shall provide services and assistance.
- (b) If voluntary arrangements, including the services of the Federal Mediation and Conciliation Service or any other third-party mediation, fail to resolve a negotiation impasse--
 - (1) either party may request the Federal Service Impasses Panel to consider the matter, or
 - (2) the parties may agree to adopt a procedure for binding arbitration of the negotiation impasses, but only if the procedure is approved by the Panel.
- (c) (1) The Federal Service Impasses Panel is an entity within the Authority, the function of which is to provide assistance in resolving negotiation impasses between agencies and exclusive representatives.

- (2) The Panel shall be composed of a Chairman and at least six other members, who shall be appointed by the President, solely on the basis of fitness to perform duties and functions involved, from among individuals who are familiar with Government operations and knowledgeable in labor-management relations.
- (3) Of the original members of the Panel, 2 members shall be appointed for a term of 1 year, 2 members shall be appointed for a term of 3 years, and the Chairman and the remaining members shall be appointed for a term of 5 years. Thereafter each member shall be appointed for a term of 5 years, except that an individual chosen to fill a vacancy shall be appointed for the unexpired term of the member replaced. Any member of the Panel may be removed by the President.
- (4) The Panel may appoint an Executive Director and any other individuals it may from time to time find necessary for the proper performance of its duties. Each member of the Panel who is not an employee (as defined in section 2105 of this title) is entitled to pay at a rate equal to the daily equivalent of the maximum annual rate of basic pay then currently paid under the General Schedule for each day he is engaged in the performance of official business of the Panel, including travel time, and is entitled to travel expenses as provided under section 5703 of this title.
- (5) (A) The Panel or its designee shall promptly investigate any impasse presented to it under subsection (b) of this section. The Panel shall consider the impasse and shall either--
 - (i) recommend to the parties procedures for the resolution of the impasse; or
 - (ii) assist the parties in resolving the impasse through whatever methods and procedures, including fact-finding and recommendations, it may consider appropriate to accomplish the purpose of this section.
- (B) If the parties do not arrive at a settlement after assistance by the Panel under subparagraph (A) of this paragraph, the Panel may--
 - (i) hold hearings;
 - (ii) administer oaths, take the testimony or deposition of any person under oath, and issue subpoenas as provided in section 7132 of this title; and
 - (iii) take whatever action is necessary and not inconsistent with this chapter to resolve the impasse.
- (C) Notice of any final action of the Panel under this section shall be promptly served upon the parties, and the action shall be binding on such parties during the term of the agreement, unless the parties agree otherwise.

§ 7120. Standards of conduct for labor organizations

- (a) An agency shall only accord recognition to a labor organization that is free from corrupt influences and influences opposed to basic democratic principles. Except as provided in subsection (b) of this section, an organization is not required to prove that it is free from such influences if it is subject to governing requirements adopted by the organization or by a

national or international labor organization or federation of labor organizations with which it is affiliated, or in which it participates, containing explicit and detailed provisions to which it subscribes calling for--

- (1) the maintenance of democratic procedures and practices including provisions for periodic elections to be conducted subject to recognized safeguards and provisions defining and securing the right of individual members to participate in the affairs of the organization, to receive fair and equal treatment under the governing rules of the organization, and to receive fair process in disciplinary proceedings;
 - (2) the exclusion from office in the organization of persons affiliated with communist or other totalitarian movements and persons identified with corrupt influences;
 - (3) the prohibition of business or financial interests on the part of organization officers and agents which conflict with their duty to the organization and its members; and
 - (4) the maintenance of fiscal integrity in the conduct of the affairs of the organization, including provisions for accounting and financial controls and regular financial reports or summaries to be made available to members.
- (b) Notwithstanding the fact that a labor organization has adopted or subscribed to standards of conduct as provided in subsection (a) of this section, the organization is required to furnish evidence of its freedom from corrupt influences or influences opposed to basic democratic principles if there is reasonable cause to believe that--
- (1) the organization has been suspended or expelled from, or is subject to other sanction, by a parent labor organization, or federation of organizations with which it had been affiliated, because it has demonstrated an unwillingness or inability to comply with governing requirements comparable in purpose to those required by subsection (a) of this section; or
 - (2) the organization is in fact subject to influences that would preclude recognition under this chapter.
- (c) A labor organization which has or seeks recognition as a representative of employees under this chapter shall file financial and other reports with the Assistant Secretary of Labor for Labor Management Relations, provide for bonding of officials and employees of the organization, and comply with trusteeship and election standards.
- (d) The Assistant Secretary shall prescribe such regulations as are necessary to carry out the purposes of this section. Such regulations shall conform generally to the principles applied to labor organizations in the private sector. Complaints of violations of this section shall be filed with the Assistant Secretary. In any matter arising under this section, the Assistant Secretary may require a labor organization to cease and desist from violations of this section and require it to take such actions as he considers appropriate to carry out the policies of this section.
- (e) This chapter does not authorize participation in the management of a labor organization or acting as a representative of a labor organization by a management official, a supervisor, or a confidential employee, except as specifically provided in this chapter, or by an employee if

the participation or activity would result in a conflict or apparent conflict of interest or would otherwise be incompatible with law or with the official duties of the employee.

- (f) In the case of any labor organization which by omission or commission has willfully and intentionally, with regard to any strike, work stoppage, or slowdown, violated section 7116(b)(7) of this title, the Authority shall, upon an appropriate finding by the Authority of such violation--
 - (1) revoke the exclusive recognition status of the labor organization, which shall then immediately cease to be legally entitled and obligated to represent employees in the unit; or
 - (2) take any other appropriate disciplinary action.

SUBCHAPTER III – GRIEVANCES, APPEALS, AND REVIEW

§ 7121. Grievance procedures

- (a) (1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d), (e) and (g) of this section, the procedures shall be the exclusive administrative procedures for resolving grievances which fall within its coverage.
- (2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.
- (b) (1) Any negotiated grievance procedure referred to in subsection (a) of this section shall--
 - (A) be fair and simple,
 - (B) provide for expeditious processing, and
 - (C) include procedures that--
 - (i) assure an exclusive representative the right, in its own behalf or on behalf of any employee in the unit represented by the exclusive representative, to present and process grievances;
 - (ii) assure such an employee the right to present a grievance on the employee's own behalf, and assure the exclusive representative the right to be present during the grievance proceeding; and

- (iii) provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration which may be invoked by either the exclusive representative or the agency.
- (2) (A) The provisions of a negotiated grievance procedure providing for binding arbitration in accordance with paragraph (1)(C)(iii) shall, if or to the extent that an alleged prohibited personnel practice is involved, allow the arbitrator to order--
- (i) a stay of any personnel action in a manner similar to the manner described in section 1221(c) with respect to the Merit Systems Protection Board; and
 - (ii) the taking, by an agency, of any disciplinary action identified under section 1215(a)(3) that is otherwise within the authority of such agency to take.
- (B) Any employee who is the subject of any disciplinary action ordered under subparagraph (A)(ii) may appeal such action to the same extent and in the same manner as if the agency had taken the disciplinary action absent arbitration.
- (c) The preceding subsections of this section shall not apply with respect to any grievance concerning--
- (1) any claimed violation of subchapter III of chapter 73 of this title (relating to prohibited political activities);
 - (2) retirement, life insurance, or health insurance;
 - (3) a suspension or removal under section 7532 of this title;
 - (4) any examination, certification, or appointment; or
 - (5) the classification of any position which does not result in the reduction in grade or pay of an employee.
- (d) An aggrieved employee affected by a prohibited personnel practice under section 2302(b)(1) of this title which also falls under the coverage of the negotiated grievance procedure may raise the matter under a statutory procedure or the negotiated procedure, but not both. An employee shall be deemed to have exercised his option under this subsection to raise the matter under either a statutory procedure or the negotiated procedure at such time as the employee timely initiates an action under the applicable statutory procedure or timely files a grievance in writing, in accordance with the provisions of the parties' negotiated procedure, whichever event occurs first. Selection of the negotiated procedure in no manner prejudices the right of an aggrieved employee to request the Merit Systems Protection Board to review the final decision pursuant to section 7702 of this title in the case of any personnel action that could have been appealed to the Board, or, where applicable, to request the Equal Employment Opportunity Commission to review a final decision in any other matter involving a complaint of discrimination of the type prohibited by any law administered by the Equal Employment Opportunity Commission.
- (e) (1) Matters covered under sections 4303 and 7512 of this title which also fall within the coverage of the negotiated grievance procedure may, in the discretion of the aggrieved

employee, be raised either under the appellate procedures of section 7701 of this title or under the negotiated grievance procedure, but not both. Similar matters which arise under other personnel systems applicable to employees covered by this chapter may, in the discretion of the aggrieved employee, be raised either under the appellate procedures, if any, applicable to those matters, or under the negotiated grievance procedure, but not both. An employee shall be deemed to have exercised his option under this subsection to raise a matter either under the applicable appellate procedures or under the negotiated grievance procedure at such time as the employee timely files a notice of appeal under the applicable appellate procedures or timely files a grievance in writing in accordance with the provisions of the parties' negotiated grievance procedure, whichever event occurs first.

- (2) In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section, an arbitrator shall be governed by section 7701(c)(1) of this title, as applicable.
- (f) In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section, section 7703 of this title pertaining to judicial review shall apply to the award of an arbitrator in the same manner and under the same conditions as if the matter had been decided by the Board. In matters similar to those covered under sections 4303 and 7512 of this title which arise under other personnel systems and which an aggrieved employee has raised under the negotiated grievance procedure, judicial review of an arbitrator's award may be obtained in the same manner and on the same basis as could be obtained of a final decision in such matters raised under applicable appellate procedures.
- (g)
 - (1) This subsection applies with respect to a prohibited personnel practice other than a prohibited personnel practice to which subsection (d) applies.
 - (2) An aggrieved employee affected by a prohibited personnel practice described in paragraph (1) may elect not more than one of the remedies described in paragraph (3) with respect thereto. For purposes of the preceding sentence, a determination as to whether a particular remedy has been elected shall be made as set forth under paragraph (4).
 - (3) The remedies described in this paragraph are as follows:
 - (A) An appeal to the Merit Systems Protection Board under section 7701.
 - (B) A negotiated grievance procedure under this section.
 - (C) Procedures for seeking corrective action under subchapters II and III of chapter 12.
 - (4) For the purpose of this subsection, a person shall be considered to have elected--
 - (A) the remedy described in paragraph (3)(A) if such person has timely filed a notice of appeal under the applicable appellate procedures;
 - (B) the remedy described in paragraph (3)(B) if such person has timely filed a grievance in writing, in accordance with the provisions of the parties' negotiated procedure; or

(C) the remedy described in paragraph (3)(C) if such person has sought corrective action from the Office of Special Counsel by making an allegation under section 1214(a)(1).

(h) Settlements and awards under this chapter shall be subject to the limitations in section 5596(b)(4) of this title.

§ 7122. Exceptions to arbitral awards

(a) Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award pursuant to the arbitration (other than an award relating to a matter described in section 7121(f) of this title). If upon review the Authority finds that the award is deficient--

(1) because it is contrary to any law, rule, or regulation; or

(2) on other grounds similar to those applied by Federal courts in private sector labor-management relations;

the Authority may take such action and make such recommendations concerning the award as it considers necessary, consistent with applicable laws, rules, or regulations.

(b) If no exception to an arbitrator's award is filed under subsection (a) of this section during the 30-day period beginning on the date the award is served on the party, the award shall be final and binding. An agency shall take the actions required by an arbitrator's final award. The award may include the payment of backpay (as provided in section 5596 of this title).

§ 7123. Judicial review; enforcement

(a) Any person aggrieved by any final order of the Authority other than an order under--

(1) section 7122 of this title (involving an award by an arbitrator), unless the order involves an unfair labor practice under section 7118 of this title, or

(2) section 7112 of this title (involving an appropriate unit determination),

may, during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority's order in the United States court of appeals in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia.

(b) The Authority may petition any appropriate United States court of appeals for the enforcement of any order of the Authority and for appropriate temporary relief or restraining order.

- (c) Upon the filing of a petition under subsection (a) of this section for judicial review or under subsection (b) of this section for enforcement, the Authority shall file in the court the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of the petition, the court shall cause notice thereof to be served to the parties involved, and thereupon shall have jurisdiction of the proceeding and of the question determined therein and may grant any temporary relief (including a temporary restraining order) it considers just and proper, and may make and enter a decree affirming and enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Authority. The filing of a petition under subsection (a) or (b) of this section shall not operate as a stay of the Authority's order unless the court specifically orders the stay. Review of the Authority's order shall be on the record in accordance with section 706 of this title. No objection that has not been urged before the Authority, or its designee, shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances. The findings of the Authority with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any person applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there were reasonable grounds for the failure to adduce the evidence in the hearing before the Authority, or its designee, the court may order the additional evidence to be taken before the Authority, or its designee, and to be made a part of the record. The Authority may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed. The Authority shall file its modified or new findings, which, with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The Authority shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with the court, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the judgment and decree shall be subject to review by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.
- (d) The Authority may, upon issuance of a complaint as provided in section 7118 of this title charging that any person has engaged in or is engaging in an unfair labor practice, petition any United States district court within any district in which the unfair labor practice in question is alleged to have occurred or in which such person resides or transacts business for appropriate temporary relief (including a restraining order). Upon the filing of the petition, the court shall cause notice thereof to be served upon the person, and thereupon shall have jurisdiction to grant any temporary relief (including a temporary restraining order) it considers just and proper. A court shall not grant any temporary relief under this section if it would interfere with the ability of the agency to carry out its essential functions or if the Authority fails to establish probable cause that an unfair labor practice is being committed.

SUBCHAPTER IV – ADMINISTRATIVE AND OTHER PROVISIONS

§ 7131. Official time

- (a) Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this chapter shall be authorized official time for such purposes, including attendance at impasse proceeding, during the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes.
- (b) Any activities performed by any employee relating to the internal business of a labor organization (including the solicitation of membership, elections of labor organization officials, and collection of dues) shall be performed during the time the employee is in a nonduty status.
- (c) Except as provided in subsection (a) of this section, the Authority shall determine whether any employee participating for, or on behalf of, a labor organization in any phase of proceedings before the Authority shall be authorized official time for such purpose during the time the employee otherwise would be in a duty status.
- (d) Except as provided in the preceding subsections of this section--
 - (1) any employee representing an exclusive representative, or
 - (2) in connection with any other matter covered by this chapter, any employee in an appropriate unit represented by an exclusive representative,

shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.

§ 7132. Subpenas

- (a) Any member of the Authority, the General Counsel, or the Panel, any administrative law judge appointed by the Authority under section 3105 of this title, and any employee of the Authority designated by the Authority may--
 - (1) issue subpenas requiring the attendance and testimony of witnesses and the production of documentary or other evidence from any place in the United States; and
 - (2) administer oaths, take or order the taking of depositions, order responses to written interrogatories, examine witnesses, and receive evidence.

No subpoena shall be issued under this section which requires the disclosure of intramanagement guidance, advice, counsel, or training within an agency or between an agency and the Office of Personnel Management.

- (b) In the case of contumacy or failure to obey a subpoena issued under subsection (a)(1) of this section, the United States district court for the judicial district in which the person to whom the subpoena is addressed resides or is served may issue an order requiring such person to appear at any designated place to testify or to produce documentary or other evidence. Any failure to obey the order of the court may be punished by the court as a contempt thereof.
- (c) Witnesses (whether appearing voluntarily or under subpoena) shall be paid the same fee and mileage allowances which are paid subpoenaed witnesses in the courts of the United States.

§ 7133. Compilation and publication of data

- (a) The Authority shall maintain a file of its proceedings and copies of all available agreements and arbitration decisions, and shall publish the texts of its decisions and the actions taken by the Panel under section 7119 of this title.
- (b) All files maintained under subsection (a) of this section shall be open to inspection and reproduction in accordance with the provisions of sections 552 and 552a of this title.

§ 7134. Regulations

The Authority, the General Counsel, the Federal Mediation and Conciliation Service, the Assistant Secretary of Labor for Labor Management Relations, and the Panel shall each prescribe rules and regulations to carry out the provisions of this chapter applicable to each of them, respectively. Provisions of subchapter II of chapter 5 of this title shall be applicable to the issuance, revision, or repeal of any such rule or regulation.

§ 7135. Continuation of existing laws, recognitions, agreements, and procedures

- (a) Nothing contained in this chapter shall preclude--
 - (1) the renewal or continuation of an exclusive recognition, certification of an exclusive representative, or a lawful agreement between an agency and an exclusive representative of its employees, which is entered into before the effective date of this chapter; or
 - (2) the renewal, continuation, or initial according of recognition for units of management officials or supervisors represented by labor organizations which historically or traditionally represent management officials or supervisors in private industry and which

hold exclusive recognition for units of such officials or supervisors in any agency on the effective date of this chapter.

- (b) Policies, regulations, and procedures established under and decisions issued under Executive Orders 11491, 11616, 11636, 11787, and 11838, or under any other Executive order, as in effect on the effective date of this chapter, shall remain in full force and effect until revised or revoked by the President, or unless superseded by specific provisions of this chapter or by regulations or decisions issued pursuant to this chapter.